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ABSTRACT

This publication of ten scholarly articles provides perspectives on problems and forces that inhibit freedom of speech. 1) "Freedom of Speech and Change in American Education" suggests that a more communicative society, and increasing academic freedoms, helps schools adapt to social change; 2) "Syllabus and Bibliography for 'Issues in Freedom of Speech'" provides a framework for examination of theories, cases, and issues related to freedom of speech; 3) "Survey Research in Free Speech Attitudes" summarizes free speech attitudes held by Americans; 4) "Federal Censorship of National Open Forum Radio" reports a conflict of attitudes between important legislative and administrative figures concerning broadcasting; 5) "The Crisis in Public Confidence in Public Communication"; 6) "The resistance and the Court: The Punitive Draft Cases"; 7) "The Flag as a non-Verbal Symbol: gives five explanations for the behavior of flag "supporters"; 8) "Symbolic Speech: A Constitutional Orphan" states that all symbolic speech should be given full First Amendment protection; 9) "The Supreme Court and the First Amendment: The 1970 Term" examines the Pentagon Papers case in the context of a series of decisions; 10) "Freedom of Speech Bibliography: July 1970--June 1971 Articles, Books, and Court Decisions." (Author/SJM)

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Free Speech Yearbook: 1971

a publication of
The Committee on Freedom of Speech
of the
Speech Communication Association

Editor, Thomas L. Tedford
Associate Professor of Drama and Speech
University of North Carolina at Greensboro

SP 005 031

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Speech Communication Association
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EDITOR'S COMMENTS

Acknowledgments

The Editor wishes to express his appreciation to the members of the Speech Communication Association who served as editorial consultants for the Free Speech Yearbook: 1971. Particular gratitude is expressed to Alvin Goldberg, Franklyn Haiman, Alton Barbour, Richard Johannesen, Haig Bosmajian, Robert M. O'Neil, Nancy McDermid, and L. Dean Fadely.

Call for Papers for 1971

Those who wish to submit syllabuses or scholarly articles to be considered for use in the 1972 Yearbook should send their manuscripts as soon as possible to Thomas L. Tedford, Dept. of Drama and Speech, UNC-G, Greensboro, N. C. 27412. The primary deadline for contributions is August 1, 1972, and the secondary and final deadline is September 1, 1972. Those articles submitted by the primary deadline will be given first consideration.

Writers should send three copies of their manuscripts. The style guide for the Yearbook is Kate L. Turabian's A Manual for Writers, Third Edition, Revised (University of Chicago Press, 1967). Note that Turabian includes both city of publication and the name of the publishing company for books.

The Newsletter

The Committee on Freedom of Speech publishes its newsletter, Free Speech, each quarter of the academic year. News concerning freedom of speech as well as subscription requests should be sent to the editor, Haig Bosmajian (Dept. of Speech, University of Washington, Seattle, Washington 98105).

INTRODUCTION
FREEDOM OF SPEECH AND CHANGE IN AMERICAN EDUCATION

William S. Howell
Professor of Speech Communication, University of Minnesota
and
President, Speech Communication Association

One of the responsibilities of the Speech Communication Association is to identify and cope with the forces that inhibit freedom of speech. We should persuade our membership and the public to confront restriction of expression as a critical issue of our time. The dialogue on problems of free speech must be kept open and up-to-date. The present Free Speech Yearbook may indeed be our most effective single effort to this end.

A mid 1971 perspective provides a fast changing picture in which academic freedom and freedom of speech in all levels of American education are inextricably intermingled. While the forces operating to increase or decrease these freedoms are establishing everchanging points of balance, the issues of free expression and experimentation in education are steadily gaining in importance. A review of recent trends and present pressures may highlight some current problems.

There is certainly a subjective impression of recent change in issues of freedom of speech on campuses of colleges and universities. Not many years ago "speaker policy" was hotly debated. Now, recognized student groups invite speakers of their choice, by and large, subject only to such practical considerations as advance scheduling and demonstrating a reasonable probability that the program will not seriously interrupt the ongoing business of education.

Though still restricted by many less-than-logical prohibitions, student publications are less controlled than they were a decade ago. Prior censorship, per se, has lost many of its attractions and most of its proponents. Policies that substitute post-utterance and post-publication responsibility for prior censorship are proving to be effective means of upgrading standards of student initiated communications.

Rather than showing a record of steady progress the trend toward more freedom suffers frequent setbacks and as a result ebbs and flows. Recently tensions from the Viet Nam war, inflation, a diminishing faith in education, and a relative dwindling of financial support for all levels of education have contributed to regressions in freedom of expression. In spite of recent setbacks, that we are progressing toward a more openly communicative society seems to me to be undeniable. As teachers of speech communication we have a particular obligation to encourage and accelerate that trend.

Our currently troubled times have further narrowed a normally restricted avenue of communication, that connecting school and community. Within academe, we agree in principle that we should make every effort to let the community know precisely what we are doing, and why. In practice, we are very reserved indeed in opening our enterprise to public scrutiny. A one-sided self censorship effectively prevents the frankness needed to truly unify school and community. In part, we lack the ability to tell about our work interestingly and in terms that can be easily understood. But mainly, we have made little effort to accomplish that communication. Here is one freedom of speech that school people can control completely. Leadership in opening up school-community channels falls naturally to those whose specialization is speech communication. Consequently, our obligation here becomes obvious.

Academic freedom, the essence of which is freedom of speech in the classroom, needs much more definition and exploration. Teacher and student have different duties, privileges and responsibilities, due to their authoritarian leader-captive audience relationship. A teacher can shut off or turn on responses that are relevant to a topic. For the student to have a chance to speak with freedom the teacher must make a positive effort to preserve the maximum possible amount of decision making for the student. If he does not make a conscious attempt to maximize options available to his students, his prejudices and preferences will overwhelm the members of his classes and restrict them to a narrow range of responses, or to no responses at all.

Many of us fail to appreciate that freedom of speech in the classroom depends upon the ability of the teacher to separate his arbitrary opinion from that content of the course which is generally accepted by scholars in his field. Further, an instructor should identify his personal interpretations and preferences as his own, and call attention of his students to the fact that these differ from matters of general consensus. A tragic circumstance that may well be majority practice in the modern American classroom is the blending of generally accepted information and controversial opinion so that distinguishing between them becomes a practical impossibility.

What I am suggesting is that the teacher label his utterances in a way that helps students classify them as either generally agreed upon information or as the instructor's personal belief. Teachers should routinely and frequently make statements like this, "My overview of five theoretical approaches to the study of this subject seems to me to be non-controversial. Now, I'd like to tell you the approach I like best and why. I'll give you my reasons for that preference, and you will recognize that this is but one man's opinion."

Why is it important that the teacher introduce his or her bias? Does not a substantial segment of the community contend that classroom communication should be limited to concepts that are not controversial? For at least two reasons I consider it highly important that the instructor "teach" his personal stand and interpretations taking care to label them as such. First, his students are entitled to know his posture and conjectures. These are important to them not only because he has developed his

preferences through years of study and deliberation, but because his openly expressed bias enables his students to understand him better. His off beat hunches may precipitate valuable insights. Second, he cannot convey his subject adequately unless he expresses ideas and hypotheses that must be classified as "not quite sure" notions. This is an elementary aspect of academic freedom, one which is always under pressure, and one on which we cannot compromise. Materials that may be true, and in which a teacher has faith, advance thinking in any subject more significantly and reliably than does a central core of approved concepts.

When we combine the captive audience situation of the classroom with insistence upon a substantial amount of biased and controversial content a delicate balance of forces is required to guarantee a satisfactorily free interaction. Difficulties are resolved, it seems to me, by the simple expedient of labelling personal opinion as such when it is expressed, telling a class in effect, when the mode of communication changes from informing to persuading.

Freedom of expression in the classroom can be preserved only if the teacher preserves it. Many of us who preside over classrooms believe sincerely that our classes are free and open when in fact only certain types of responses are possible. We should check on the implementation of our good intentions by some form of feedback that is protected by anonymity. At Minnesota our Student Evaluation Form includes two questions that help the instructor assess the degree of freedom of speech he has achieved: "Did the instructor present or allow more than one view in controversial matters?" and "Was the instructor receptive to the expression of student views?"

Freedom of speech for students should concern us more than freedom of speech for teachers and administrators because of our long tradition of student submission to domination by older and presumably wiser persons. Welcoming student criticism of education multiplies problems faced by schools and colleges. The inertia of the established bureaucracy makes receptivity to change unlikely, and since the status quo is more comfortable than an untried future, a multitude of pressures evolve that reinforce silence and punish protest. For example, the widespread active opposition to the Viet Nam War by students in the Spring of 1970 has been replaced by a norm of sullen silence. Results of their strikes, marches and campaigns of personal persuasion were discouraging. Protesters were punished by police action and by hostility of their local, state and national governments, and they are still being held to account for classes missed at the time of the protest. Repression by the Establishment has worked well. Creative energies of youth that might have accelerated our progress toward a better world have been bottled up, and the inhumanities of our national and international status quo are better protected from corrective action than they were a year or two ago.

We tend to underestimate the chilling effect of the climate of conformity that stifles creativity in all public educational institutions. In his book Points of Rebellion

Supreme Court Justice William O. Douglas summarizes present circumstances and trends:

"Throughout the country the climate within our public schools has been against the full flowering of First Amendment traditions.

The great rewards are in the Establishment and in work for the Establishment."[1]

"Our colleges and universities reflect primarily the interests of the Establishment and the status quo."[2]

"The university becomes a collection of technicians in a service station, trying to turn out better technocrats for a technological society. Then all voices become a chorus supporting the status quo; there is no challenger from the opposition warning of dangers to come. The result is a form of goose-stepping and the installation of conformity as king. Such has been the increasing tendency in this country for the last quarter century."[3]

I doubt that Justice Douglas exaggerates. The conformity we live in deceives us. As long as we, our colleagues and our students abide by the premises consistent with our society, institutions, and government there is considerable range or permissable expression. Harmless differences abound, and we preoccupy ourselves by discussing them, feeling good all the while that we are contributing to the ongoing democratic process. But when a member of the academic community violates one of the premises by suggesting alternatives to private enterprise, or to national honor or to unquestioning loyalty to the fatherland, or to any other of a dozen bedrock values we treasure, our open minds close with a frightening snap. Education resembles any other huge bureaucratic structure in its intrinsic conservatism. Individuals who might produce or encourage truly radical innovation and in another situation would welcome and enjoy it are swallowed up in the conventionalizing organization and usually decide not to rock the boat.

Not making waves becomes a major behavior-shaping force in all large organizations, and in education it is augmented by the need for financial and moral backing. Schools are supported by constituents, and are accountable to them. The crusader for increased freedoms in education can never forget for long the fact that his out-of-the-ordinary classroom activity may upset his community, with financial deprivation of his school as a consequence. The state and federal governments contribute conformity pressures by financing selected research, buildings, and particular instructional programs. Genuinely open exploration of any academic discipline threatens organizational stability, as well as the financial and other supports of constituents. The hazards of promoting free speech within education are intimidating to both teachers and students, and terrifying to administrators. In many school systems it is still possible to defy disapproving community leaders, and to refuse to compromise an actual open system for the pseudo-openness that is limited to insignificant differences.

But month by month this defiance becomes more expensive.

Our "academic freedom blues" have only begun. Students at all levels push for drastic innovations while their parents want not only nothing new but many would return to the more rigid forms of some decades ago.

Luther Gerlach designates two types of change: developmental and revolutionary. The older generation hopes to limit modifications in the schools to developmental changes, those continuing "within the basic themes of the ongoing system." Radical students press for revolutionary changes, "the generation of whole new and quite startling courses of thought and action." Gerlach summarizes:

> If we seek to solve our problems of education by building more buildings, by improving the quality of conventional textbooks and teaching methods, we will keep the system going, surviving, but make it increasingly unlikely that we will be the country that forges ahead to the really new types of education.[4]

With status quo and revolutionary forces battling around us we have every impulse to call in our wide-ranging elements and play it safe. But when students are ready to work out new patterns, as they are now, then if ever, we should be freely experimental. If the schools are to contribute to what Gerlach terms "our exploring society," faculty and administrators will join forces with rebellious students to evolve better and drastically different ways of education.

Whether developmental or revolutionary change will predominate in American education remains to be seen. The trend in expert opinion seems to be that nothing less than basic revision can enable schools to meet the needs of modern times. Alvin Toffler confidently predicts the course of coming events:

> While most colleges and universities have greatly broadened the variety of their course offerings, they are still wedded to complex standardizing systems based on degrees, majors and the like. These systems lay down basic tracks along which all students must progress. While educators are rapidly multiplying the number of alternative paths, the pace of diversification is by no means swift enough for the students. This explains why young people have set up "para-universities"--experimental colleges and so-called free universities--in which each student is free to choose what he wishes from a mind-shattering smorgasbord of courses that range from guerrilla tactics and stock market techniques to Zen Buddhism and "underground theater."

> Long before the year 2000, the entire antiquated structure of degrees, majors and credits will be a shambles. No two students will move along exactly the same educational track, for the students now pressuring higher education to destandardize, to move toward super-industrial diversity, will win their battle.[5]

To protect ourselves from future shock severely detrimental to us, to education and to the quality of life in general, we should assum that Toffler's prediction will come true. With every radical innovation in the schools will come increased restrictive pressure from the surrounding communities. How can students, faculty and administration maintain an academic freedom absolutely necessary to revolutionary change?

Pressure from without can be neutralized only by pressure from within. Somehow academics must accumulate the "clout" that will enable them to demand truly open exploration of educational options. Improved public relations will help, but simply communicating more effectively with our publics will be too little, too late. Coordination of all the diverse forces in education to create a united front for educational reform is prerequisite to maintenance of flexibility.

No one from the outside will tell educators what to do to preserve a wide range of options and freedom to change. If education is to evolve with society, conflict among diverse educational levels and agencies must be replaced by cooperation. The program of public education for a city or a state should be comprehensive, coordinated and integrated from kindergarten through graduate school. Nothing less can be defended as meeting the needs of society. Educators must rearrange and police their own enterprise. It is possible that decentralized but comprehensive organization and collective bargaining can advance public education. A totally unified system of education, designed to meet needs of a particular population, can hold its own with other vested interests in competition for limited public funds.

In 1971 shrinking academic freedoms concern us because these limit our flexibility in adapting schools to social change. The Speech Communication Association and all professional organizations in education should assign top priority to increased cooperation and coordination, brought about by student and faculty organization designed to protect and advance all levels of American education.

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FOOTNOTES

[1]William O. Douglas, Points of Rebellion (New York: Random House, 1970), p. 12.

[2]Ibid., p. 113.

[3]Ibid., p. 16.

[4]Luther P. Gerlach, "Our 'Exploring Society,'" Minneapolis Tribune, August 1, 1971, p. 15A.

[5]Alvin Toffler, Future Shock (New York: Random House, 1970), p. 241.

SYLLABUS AND BIBLIOGRAPHY FOR
ISSUES IN FREEDOM OF SPEECH

Richard B. Gartrell
Assistant Professor of Speech
Doane College (Crete, Nebraska)

Catalog Description: An examination of theories, cases, and issues related to the First Amendment and freedom of speech; analysis of issues related to dissent, social protest, and artistic freedom: censorship, invasion of privacy, political heresy, academic freedom, and other related areas.

Class Level: Juniors and Seniors (undergraduates).

Credit: One (1) semester unit (equal to four credit hours).

Method of Instruction: Seminar format, including lecture-discussions, oral reports, films, guest speakers, examinations, and individualized instruction projects.

Texts:

Bosmajian, Haig. The Principles and Practice of Freedom of Speech. Boston: Houghton-Mifflin, 1971.

Chafee, Zechariah, Jr. Free Speech in the United States. Cambridge, Mass.: Harvard University Press, 1941.

Clor, Harry M. Obscenity and Public Morality: Censorship in a Liberal Society. Chicago: University of Chicago Press, 1969.

Emerson, Thomas I. Toward a General Theory of the First Amendment. New York: Random House, 1966.

Gordon, William I. Nine Men Plus: Supreme Court Opinions on Free Speech and Free Press (an academic game-simulation). Dubuque: William C. Brown, Co., 1971.

Haiman, Franklyn S. Freedom of Speech: Issues and Cases. New York: Random House, 1965.

Meiklejohn, Alexander. Political Freedom. New York: Oxford University Press, 1965.

O'Neil, Robert. Free Speech: Responsible Communication Under Law. New York: Bobbs-Merrill, 1966.

President's Commission. The Report of the Commission on Obscenity and Pornography. New York: Random House, 1971.

Summers, Marvin. Free Speech and Political Protest. Boston: D. C. Heath and Company, 1957.

Course Objectives: The course is designed to meet the following objectives: (1) To expose students to concepts related to freedom of speech, its historical development

and judicial interpretations; (2) To acquaint students with historical court cases and decisions related to freedom of speech including judicial and political trends; (3) To sensitize the student to relevant current issues and cases related to freedom of expression; (4) and to demonstrate that the discipline of speech-communication is directly related to and affected by issues and cases in freedom of speech.

Course Outline:

I. Issues in Freedom of Speech

A. Philosophical Foundations of Freedom of Speech (including discussions of Mills, Milton, and others.)

B. Judicial Interpretations of Freedom of Speech
1. Absolute Interpretation
2. Clear-and-Present-Danger Interpretation
3. Balancing Interpretation
4. Preferred Position Interpretation

Additional suggested reading: Shapiro, Martin. Freedom of Speech: The Supreme Court and Judicial Review. Englewood Cliffs: Prentice-Hall, Inc., 1966.

C. Our Political Legacy: An Historical Overview
1. Political Dissenters and Suppression
Additional suggested readings: Preston, William, Jr. Aliens and Dissenters: Federal Suppression of Radicals 1903-1933. New York: Harper and Row, 1963; and Smith, James M. Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties. Ithaca: Cornell University Press, 1956.
2. Concentration Camps of World War II and the Japanese-American
Additional suggested readings: Bosworth, Allan R. America's Concentration Camps. New York: W. W. Norton, 1967; and Thomas, Dorothy S. and Richard Nishimoto. The Spoilage: Japanese-American Evacuation and Resettlement During World War II. Berkeley: University of California Press, 1969.
Film: "Nisei: The Pride and the Shame" (A 35-minute black and white, 16mm. film produced by CBS, 20th. Century Series, dated 1965, narrated by Walter Cronkite; this film was obtained through Mr. Masao W. Satow, National Director, Japanese-American Citizens League, 1645 Post Street, San Francisco, California 94115.)

3. Congressional Investigations (including the HUAC-HISC eras)
   Additional suggested reading: Goodman, Walter. The Committee: The Extraordinary Career of the House Committee on Un-American Activities. New York: Farrar, Strauss, and Giroux, Inc., 1968.
   Films: "Operation Abolition" Produced by the House Committee on Un-American Activities, and "Operation Correction" Produced by the American Civil Liberties Union--Northern California. Both films relate to the HUAC Hearings in San Francisco during the Fifties. Rental Fees: $15.00 per film. Obtained through: ACLUNC, 503 Market Street, San Francisco, California 94105.
4. Loyalty Oaths and Freedom of Expression
   Additional suggested readings: Gardner, David P. The California Oath Controversy. Berkeley: University of California Press, 1967; and Stewart, George R. The Year of the Oath. Garden City: Doubleday and Co., 1950.
5. Breach of Peace and Public Protest
   Additional suggested readings: Haiman, Franklyn S. "The Rhetoric of the Streets: Some Legal and Ethical Considerations," Quarterly Journal of Speech, April, 1967, pp. 99-114. (Other assignment will include appropriate U. S. Supreme Court cases.)
6. Invasion of Privacy and Freedom of Expression
7. Symbolic Speech: Issues and Cases

D. Academic Freedom and Freedom of Expression
   1. Academic Freedom and Faculty Rights
   2. Academic Freedom and Student Rights
   3. Academic Freedom and On-Campus Speakers

   Additional suggested reading: Bosmajian, Haig A. "The University Student's Freedom of Speech," 1968 Yearbook of the Committee on Freedom of Speech of the Speech Association of America (to be provided by the instructor); and Rice, George P., Jr. Law for the Public Speaker. North Quincy, Mass.: Christopher Publishing Company, 1958.

E. Artistic Expression and Public Morality
   1. Philosophical Viewpoints on Obscenity and Censorship
   2. Case Studies involving Current Issues and Judicial Interpretations

   Additional suggested readings: Gardiner, Harold C. The Catholic Viewpoint on Censorship. Garden City: Doubleday and Company, 1961; and Kronhausen, Eberhard, et al. Pornography and the Law: The Psychology of Erotic Realism and Pornography. 2nd ed. rev. New York: Ballantine Books, 1964; and McClellan, Grant (ed.).

Censorship in the United States. Bronx: H. W. Wilson, 1957.
Filmstrip: "Target Smut"-An Anti-Pornography filmstrip arguing the role of the U. S. Supreme Court in allowing obscenity; produced by Citizens for Decent Literature, 5570 Wilshire Blvd., Suite 1680, Los Angeles, California 90036. Purchase Price (filmstrip and LP record) $10.00.

F. Freedom of the Press (including philosophical perspectives, censorship and a free press, the free press-fair trial controversy, and freedom of the press and governmental restraints.) (Readings assigned accordingly.)

G. The Military and Freedom of Speech (The place of Freedom of Speech in the Military Establishment, current issues and cases related to the G. I. and freedom of expression; readings assigned accordingly.)

II. Organizational Resources. Below are listed a few of the many organizations which exist to fulfill certain functions within our society related to issues of free expression. The organizations are listed for the convenience of the student who should explore the various points of view represented.

AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS (AAUP)
1 DuPont Circle, Washington, D. C. 20036

AMERICAN CIVIL LIBERTIES UNION (ACLU)
(National Office) 156 Fifth Ave., New York, N. Y. 10010
(Northern Calif.) 503 Market St., SF, Calif. 94105

AMERICAN FRIENDS SERVICE COMMITTEE
Northern California Regional Office
2160 Lake Street, San Francisco, Calif. 94121

AMERICAN LIBRARY ASSOCIATION (ALA)
50 East Huron Street, Chicago, Illinois
22 East 38th Street, New York, N. Y. 10016

AMERICAN OPINION BOOKSTORE OF SAN FRANCISCO, INC.
150 Powell Street, San Francisco, California

ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH
515 Madison Avenue, New York, N. Y. 10022

ASSOCIATED PRESS
50 Rockefeller Plaza, New York, N. Y. 10020

CENTER FOR THE STUDY OF DEMOCRATIC INSTITUTIONS (CSDI)
P. O. Box 4068, Santa Barbara, Calif. 93103

CENTER FOR THE STUDY OF RESPONSIVE LAW
1908 "Q" Street, N.W., Washington, D. C.

CITIZENS COMMITTEE FOR CONSTITUTIONAL LIBERTIES (CCCL)
22 E. 17th St., Room 1525, New York, N. Y. 10003

CITIZENS FOR DECENT LITERATURE (CDL)
5670 Wilshire Blvd., Suite 1680, Los Angeles, Calif. 90036

CLEAN, INC.
Mayfair Hotel, 1256 W. 7th St., Los Angeles, Calif. 90017

COMMITTEE TO ABOLISH HISC (formerly HUAC)
(National Office) P. O. Box 74757, Los Angeles, Calif. 90004

CONGRESSIONAL QUARTERLY SERVICE
1735 "K" Street, N. W., Washington, D. C. 20006

CONGRESS ON RACIAL EQUALITY (CORE)
38 Park Row, New York, N. Y. 10038

DEPARTMENT OF JUSTICE
Assistant Attorney General for Internal Security
Division, Washington, D. C. 20530

FREEDOM OF INFORMATION CENTER
School of Journalism, University of Missouri, Columbia, Missouri

HUMAN EVENTS
422 First Street, S.E., Washington, D. C. 20003

JAPANESE-AMERICAN CITIZENS LEAGUE
1634 Post St., San Francisco, Calif. 94115

JAPANESE-AMERICANS TO REPEAL TITLE II
c/o Mr. Raymond Y. Okamura, 1150 Park Hills Road, Berkeley, Calif.

LAWYER'S CONSTITUTIONAL DEFENSE COMMITTEE
156 Fifth Avenue, New York, N. Y. 10010

LEADERSHIP CONFERENCE ON CIVIL RIGHTS
2027 Mass. Ave., N. W., Washington, D. C. 20032

MERKLE PRESS (Meet the Press)
809 Channing St., N. E., Washington, D. C. 20018

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP)
20 West 40th St., New York., N. Y. 10018

NATIONAL EDUCATION ASSOCIATION (NEA)
1201 - 16th St., N. W., Washington, D. C. 20036

NATIONAL EMERGENCY CIVIL LIBERTIES UNION
25 East 26th St., New York, N. Y. 10010

NATIONAL LAWYER'S GUILD
501 Fremont Bldg., 341 Market St., San Francisco, Calif.

NATIONAL LEGAL AID AND DEFENDER ASSOCIATION
American Bar Center, 1155 E. 60th, Chicago, Ill. 60637

SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE (SCLC)
322 Auburn Ave., N. E., Atlanta, Georgia 30303

STUDENT NON-VIOLENT COORDINATING COMMITTEE (SNCC)
350 Nelson Street, S. W., Atlanta, Georgia 30313

U. S. CATHOLIC CONFERENCE
1312 Mass. Ave., N. W., Washington, D. C. 20005

U. S. GOVERNMENT PRINTING OFFICE
Division of Public Documents, Washington, D. C. 20402

III. Library Resources. Below are listed some critical resource-reference materials which can be found in many law libraries.

Index to Legal Periodicals. Includes subject headings, index to law journal articles and table to Supreme Court cases.

U. S. Reports. Supreme Court Case Opinions.

Supreme Court Review (yearly). Normally a series of crucial legal articles related to significant supreme court decisions for that particular year.

Congressional Record. Proceedings, debates, articles, and miscellaneous congressional materials related to both the United States Senate and House of Representatives.

Federal Reporter and Federal Supplement. Frequently listed in the Index to Legal Periodicals, these publications pertain to federal court decisions and opinions. Found only in law libraries.

Shepard's Acts and Cases by Popular name: federal and state citations. As rule, found only in law libraries.

Law Journals. The law library carries a complete selection of legal journals. Some titles might include the following. California Law Review, University of Chicago Law Review, Yale Law Review, Military Law Review and Harvard Law Review.

Case and Comment. This journal, along with other legal journals, normally contains a review of supreme court decisions for the preceeding year; these reviews are found at the end of the year or the beginning of the new year. For example, see the January-February 1959 issue of Case and Comment for a review of the 1967-1968 term.

Blacks Law Dictionary by H. C. Black (West Pub., Co., Minnesota, 1951) is a key index to legal terminology.

Decision of U. S. Supreme Court (year) Term by Editorial Staff, U. S. Supreme Court Reports (Lawyer Cooperative Publishing Co., N. Y.).

When consulting vertical files, pamphlet files, or indexes, along with looking under the title of the particular case, one should also consider broader terms for further references. Such terms may include the following: loyalty oaths, riots, civil disobedience, civil liberties, freedoms, liberty amendment, first amendment, civil rights, law enforcement, crime and criminals, law, constitutional law, syndicalism, anarchism, loyalty investigations, academic freedom, invasion of privacy, obscenity, censorship, freedom of the press, breach of peace, and picketing.

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Abbott, Mary K. "The Interpretation of Freedom of Speech in the Case of Charlotte Anita Whitney." Unpublished Master's Thesis, San Francisco State College, San Francisco, 1961.

Abernathy, M. Glenn. Civil Liberties Under the Constitution. New York: Dodd, Mead and Company, 1968.

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SURVEY RESEARCH IN FREE SPEECH ATTITUDES

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Francis Biddle[1] has said that American history could be characterized in terms of the underlying divergent attitudes concerning freedom of speech. Undoubtedly, free speech issues in the United States today have a volatile character, and the gaps between those whose opinions about free expression differ seem to be widening.

Nearly thirty years ago, Zechariah Chaffee[2] said that conflicting views regarding freedom of expression could soon be among the most pressing problems of our society. The anger of activist groups protesting for "freedom now" suggests that this society is not nearly so open as many would wish it. The attempts of still other groups to restrain what they believe to be destructive behavior or dangerous expression has focused considerable attention on free speech issues and attitudes.

Evidences of hostilities appear daily in the mass media. Now is a time of conflict over unreasonable rules and unnegotiable demands. It is also a time when there is a need for reasonable rules and negotiable demands, for tolerance of deviant opinions and for understanding opposing points of view. Alan Barth[3] has suggested that men must either learn to accept or fear diversity of expression. Those who fear one another are said to lose the substance of that which holds them together. Refusal to trust the democratic process results in the quarantine of hostile doctrine and of the groups supporting them.

How accepting of diversity have Americans been in the past, and how willing are they today to tolerate unpopular opinions or points of view? This article summarizes the findings of investigators who studied the free speech attitudes held by Americans in past years and compares those findings with more recent surveys of free speech attitudes.

In 1936, Stegner[4] constructed an attitude scale designed to measure "Fascist ideology" and discovered that a number of Americans held Fascist attitudes. In 1944, Edwards[5] also found Fascist attitudes among Americans. Books and articles dealing with Fascist or "authoritarian attitudes" have been published by such scholars as Maslow,[6] Fromm,[7] and Adorno, et al.[8]

The literature in this area suggests that acceptance of authoritarianism is significant and widespread. Adorno and his colleagues attempted to determine the psychological content of authoritarian attitudes. They concluded that an individual's economic, political, and social views form a coherent and describable pattern. The

tendency of the "authoritarian personality" to accept authority and comply with group norms results in a hostility toward deviants and a willingness to restrain people with unusual views.

Horton,[9] basing his work on the research of Stegner and Edwards, attempted to discover how acceptable Nazi and Communist ideology was to American high school students when compared with the acceptability of the Bill of Rights and "superpatriotism." He found that belief in the Bill of Rights was negatively related to acceptance of Fascist and Communist ideology, to "superpatriotism," and to extreme feelings of anti-Communism. Horton also concluded that more-liberal attitudes were associated with less intense religious beliefs, that more-liberal attitudes came from urban students than from rural students, that girls scored higher than boys in agreement with the Bill of Rights, and that no high school course appeared to have any influence on Bill of Rights attitudes.

Rosenberg[10] asked the undergraduates at two Michigan colleges if they approved of letting members of the Communist party speak publicly. After three to five weeks the subjects were given a set of thirty-five cards containing value statements. The subjects were asked to sort the cards according to the importance of the value and then according to whether allowing a Communist to speak publicly would hinder or assist the achievement of the values identified by the subject as being important.

Rosenberg found out that an attitude object, such as the public speaking of Communists, may be valued for itself or as a means of achieving another attitude object, in this case, the identified values. Thus, willingness to restrict the freedom of speech of Communists may result from the relationship between that event and something else valued by the subject.

Kirsch,[11] following the work of Park[12] and Bogardus,[13] applied the concept of social distance to voting behavior. He developed a number of questions on civil liberties and on racial segregation in an attempt to discover the attitude correlates between social distance and civil liberties. Kirsch found that contact with minorities is likely to decrease social distance, and that those who are most willing to restrict some racial, ethnic, or social group are generally those who have had least contact with minority groups. This is in agreement with the research of Forster and Epstein[14] and Smith, Bruner and White[15] who found that the social setting of an individual has a functional significance in determining his attitudes.

Corder[16] attempted to discover the interrelationships among anti-democratic attitudes and found by means of factor analysis that religious affiliation, mother's education, urban-rural residence, and geographic location were important determiners of anti-democratic attitudes. Corder concluded that information and rational appeals influenced the formation of attitudes, but that an individual's frame of reference was a basic determinant of anti-democratic attitudes.

In a series of studies, Remmers[17] discovered a willingness on the part of many high school students to yield or forego the rights guaranteed by the U.S. Constitution. He found little positive change over a ten year period in the types or attitudes held or the number of students holding such attitudes. Remmers also reported that anti-democratic attitudes were prevalent in colleges and universities among both students and faculty members.

Remmers and Franklyn[18] found in 1951 that forty-five per cent of the high school students they polled favored freedom of the press, and that in 1960, twenty-nine per cent of a similar sample of high school students favored a free press. When the issue of a free press was made more specific and dealt with "objectionable material," only eleven per cent favored freedom of the press. Approximately forty per cent felt that "objectionable material" should be prohibited entirely from publication.

High school students opposed "objectionable movies" in 1960 as much as they opposed "objectionable"printed material. Only eight per cent voted for no prohibition of "objectionable movies."

Remmers and Franklyn also found that the average teenager they studied thought laws should be passed prohibiting the printing and distribution of Communist literature, a fourth to a third opposed freedom of speech and assembly and the circulation of petitions, over half felt that a visiting foreigner should not be allowed to criticize this country, and a fourth believed that Communists should not be allowed even in peace time to speak on the radio.

Of the youngsters studied by Remmers and Franklyn, over half favored segregated schools, over a third opposed interracial marriage, and a third favored restricting voting to those who didn't have "wild ideas." Remmers and Franklyn felt that the results were not reassuring, and that attitudes toward constitutional guarantees had deteriorated in the ten year period between 1951 and 1960. They concluded that teenagers, and inferentially their parents, accepted Bill of Rights guarantees with respect to religious freedom, trial by jury, and rights of property, and were somewhat supportive of the right not to testify against oneself. However, they were negative about foreigners and minority groups, and would definitely restrict the freedom of speech, of the press, and of the "people peaceably to assemble."

Moreover, teenagers felt that the federal government was best equipped to censor, the police to enforce censorship, and the post office to prosecute for "improper use of the mails." When asked their reasons for restricting, limiting, censoring, or prohibiting speech, printed materials, motion pictures, television, etc., the teenage respondents listed sex, irreligion, politics, and violence, in that order.

In an article in Look Magazine (Feb. 26, 1952),[19] Remmers asserted that attitudes toward censorship, sex, irreligion, political deviation, and violence were a single psychological dimension. The research of Gates[20] did not support Remmers'

position. Gates did a factor analytic study of the dimensions of anti-democratic attitudes of students at twenty-three Indiana colleges and universities, in an attempt to discover the cognitive and psychodynamic levels of authoritarian and anti-democratic attitudes. He concluded that the unidimensionality findings of previous researchers were unwarranted.

Struening[21] investigated anti-democratic attitudes at a midwestern university, concentrating on the political and religious attitudes of faculty members. Struening found differences in authoritarianism between groups with different academic specializations, and less pronounced differences between groups of different specialization on a prejudice scale. Frequency of church attendance and political preference were found to be highly related to prejudice and authoritarianism. More conservative political affiliation and more frequent church attendance were positively related to prejudice and authoritarianism.

Cannon[22] replicated Struening's study with a different and more varied faculty population and found variation from school to school, but close factor agreement.

A study of Cantrill[23] had people respond to the question, "Do you believe in free speech?" Nearly all of the respondents declared they favored the proposition, but subsequent questioning by Cantrill disclosed that they limited this freedom to certain conditions. Cantrill found this same problem with regard to a number of similarly worded propositions.

A Gallup Poll[24] of American adults found that ninety-two per cent of those polled had a relatively clear understanding of the expression "free speech," but only fifty per cent were in favor of free speech for everyone. Forty-five per cent favored qualifying this right, and five per cent were undecided.

Rice[25] conducted a survey of high school and college students. Nearly all had had some training in speech of government. Rice asked fourteen questions about speech and assembly, attempting to discover how students understood and interpreted their rights and freedoms, and the degree to which they supported those freedoms. He concluded that high school and college age students were deficient in their knowledge and understanding of civil and political rights. They read a little, and remembered less about what the U.S. Supreme Court said or did in the domain of speech and assembly. What Rice termed a "significant minority" (fourteen per cent) failed to recognize the value of freedom of speech and its relation to civil and political liberty. Rice commented that though student opinion was substantially in support of key speech and assembly Supreme Court decisions, it was by no means unanimous, and in some areas the margin of support for free speech was extremely narrow.

In November of 1965, over 195 million Americans took a "National Citizenship Test" produced and presented on national television by CBS News.[26] This test was given by CBS to a representative cross-section of the population constituting a

"national test sample." It must be emphasized that the items dealt with the content of citizenship, that only a few of the items dealt with the First Amendment, and that since the items asked for information, not opinion or attitude, there were right and wrong answers. The CBS test revealed that only fifty-nine per cent of the sample knew that the Bill of Rights was the first ten amendments to the Constitution and not the beginning of the Constitution itself; sixty-eight per cent knew it was legal for a man to advocate a Communist victory in Viet Nam; only thirty-one per cent knew that it was legal to advocate the overthrow of the U.S. government; seventy-seven per cent knew that a man's right to free speech did not legally allow him to threaten a jury; fifty-four per cent knew that a picketline could not obstruct traffic or endanger public safety; sixty per cent knew that it was legal to picket city hall.

Osborne and Gorden[27] surveyed freedom of speech opinion in a basic speech course at Kent State University. Students were asked about censorship, political expression, academic freedom and police power. The survey provided convincing evidence that large numbers of students express opinion which demonstrate more faith in a police state than in an open society. The data were gathered and analyzed before the student-National Guard confrontation on that campus in the spring of 1970 which resulted in the deaths of several students.

Barbour[28] constructed an instrument for measuring free speech attitudes which allowed for testing to determine whether and to what degree free speech attitudes were consistent or inconsistent with stated beliefs about freedom of speech. Ninety-three per cent of the subjects Barbour studied claimed that they believed (supported, endorsed) in free speech. However, many of the subjects who expressed a belief in free speech revealed attitudes opposed to free speech as defined and delineated by U.S. Supreme Court decisions. Response to some items on the Barbour instrument showed an extremely narrow margin of support for free speech. The affective component of free speech attitudes was found to be consonant with the cognitive, but it was always more extreme. Barbour concluded that anti-free speech attitudes were a function of reliance on authority and hostility toward those who deviated from conventional norms, standards and values.

Goding[29] used the Barbour instrument, the Buss Hostility and Guilt Inventory,[30] the Haiman[31] Open-Mindedness Scale, and the Dean[32] Power-Powerlessness Scale to tap the power and hostility dimensions of free speech attitudes. Goding interviewed seventy-five individuals representing a wide spectrum of religious belief and affiliation. He discovered a strong association between power orientation and free speech attitude. Lower power concern reflected moderate views; anti-power concern reflected free speech support, and pro-power orientation was coupled with extreme opposition to free speech. Hostility was also a significant determinant of free speech attitudes, particularly among those highly opposed to free speech. Powerlessness also significantly influenced free speech attitudes. Those persons who reported feeling powerless were most threatened by and most opposed to freedom for others.

On the basis of literature available about free speech attitudes it is reasonable to conclude that Americans are poorly informed about their constitutional rights of free speech, and that a large number of Americans, young and old, are willing to restrict the free speech of others, particularly with regard to threatening issues. Those who are concerned about preserving freedom of speech in this country are not likely to consider the research findings in this area encouraging. The preponderance of evidence about free speech attitudes is not reassuring. The writers are reminded of a story that George Bernard Shaw used to tell of a man who was famous for his swearing. One day he was watching when a wagon dumped, spilling all of his worldly goods into a river. After a pause he said, "I cannot do justice to the situation."

FOOTNOTES

[1]Francis Biddle, The Fear of Freedom (Garden City, New York: Doubleday, 1951).

[2]Zechariah Chaffe, Jr., Free Speech in the United States, 2nd ed. (Cambridge, Mass.: Harvard University Press, 1941).

[3]Alan Barth, The Loyalty of Free Men (New York: Viking Press, 1951).

[4]R. Stegner, "Fascist Attitudes: Their Determining Conditions," Journal of Social Psychology, 7 (1936), 438-454.

[5]A. L. Edwards, "The Signs of Incipient Fascism," Journal of Abnormal and Social Psychology, 39 (1944), 301, 316.

[6]A. H. Maslow, "The Authoritarian Character Structure," Journal of Social Psychology, 18 (1943), 401-411.

[7]E. Fromm, Escape from Freedom (New York: Rinehart and Company, 1941).

[8]T. W. Adorno, et al., The Authoritarian Personality (New York: Harper, 1950).

[9]Roy E. Horton, "American Freedom and the Value of Youth" (unpublished doctoral dissertation, Purdue University, 1955).

[10]M. J. Rosenberg, "Cognitive Structure and Attitudinal Affect," Journal of Abnormal and Social Psychology, 53 (1956), 367-72.

[11]A. D. Kirsch, "Social Distance and Some Related Variables in Voting Behavior," in Anti-Democratic Attitudes in American Schools, ed. by H. H. Remmers, (Evanston: Northwestern University Press, 1963).

[12]R. E. Park, "The Concept of Social Distance," Journal of Applied Psychology, 8 (1924), 339-44.

[13]E. S. Bogardus, "Measuring Social Distance," Journal of Applied Psychology, 9 (1925), 299-308.

[14]A. Forster and B. Epstein, The Trouble Makers (New York: Doubleday, 1952).

[15]M. B. Smith, J. S. Bruner, and R. W. White, Opinions and Personality (New York: Wiley, 1956).

[16]R. F. Corder, "A Factorial Approach to Anti-Democratic Attitudes" (unpublished doctoral dissertation, Purdue University, 1953).

[17]H. H. Remmers, Anti-Democratic Attitudes in American Schools (Evanston: Northwestern University Press, 1963).

[18]H. H. Remmers and R. D. Franklyn, "Sweet Land of Liberty," in Anti-Democratic Attitudes in American Schools, ed. by H. H. Remmers, (Evanston: Northwestern University Press, 1963).

[19]H. H. Remmers, "Are U. S. Teenagers Rejecting Freedom?" Look Magazine, February 26, 1952, 29-31.

[20]D. Gates, "A Factor Analytic Study of the Dimensions of Anti-Democratic Attitudes" (unpublished masters thesis, Purdue University, 1956).

[21]Struening, "Anti-Democratic Attitudes in Midwestern University," in Anti-Democratic Attitudes in American Schools, ed. by H. H. Remmers, (Evanston: Northwestern University, 1963).

[22]L. D. Cannon, "Democratic-Authoritarian Attitudes: Comparison of the Factor Patterns of Several Populations," in Anti-Democratic Attitudes in American Schools, ed. by H. H. Remmers, (Evanston: Northwestern University, 1963).

[23]H. Cantrill, Gauging Public Opinion (Princeton, N.J.: Princeton University Press, 1944).

[24]G. Gallup and S. F. Rae, The Pulse of Democracy (New York: Simon and Schuster, 1940).

[25]G. P. Rice, "Student Attitudes Toward Free Speech and Assembly," The Speech Teacher, 8 (January, 1959), 53-7.

[26]A. Westin, The National Citizenship Test (New York: Bantam, 1965).

[27]Wilbur Osborne and William Gorden, "A Freedom of Speech Survey of Student Opinion in a Basic Speech Course," Free Speech Yearbook: 1970, ed. by Thomas L. Tedford (New York: Speech Communication Association, 1970), 52-62.

[28]Alton Barbour, "Free Speech Attitude Consistency" (unpublished doctoral dissertation, University of Denver, 1968).

[29]William Goding, "The Power and Hostility Dimensions of Free Speech Attitudes" (unpublished doctoral dissertation, University of Denver, 1969).

[30]A. H. Buss, The Psychology of Aggression. (New York: Wiley, 1961).

[31]Franklyn Haiman, "A Revised Scale for the Measurement of Open-Mindedness," Speech Monographs, 31 (1964), 97-102.

[32]D. G. Dean, "Alienation: Its Meaning and Measurement," American Sociological Review, 26 (1961), 753-58.

FEDERAL CENSORSHIP OF NATIONAL OPEN FORUM RADIO

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The principle of free speech applied to the mass media is essential to a large, democratic, technological society. Our country seems to be a pluralistic collection of groups each vying for listeners to its own idealogical positions and interpretations. Only free access to the mass media will generate large enough collections of informed citizens who can then enter into the "marketplace of ideas." The resulting dialogue will help our society find its way. In this context, freedom of speech is the freedom to teach and learn about one's world in an effort to make the best possible socio-political decisions.

Vice President Spiro Agnew's recent remarks about television seem to threaten this freedom to learn, but some of his statements were correct, perhaps unintentionally. His conclusion that network news coverage is monolithic and controlled by a small power elite has been shared by journalists for years. The Vice President seems to view American society as a governmental monolith which broadcasting should reflect; but the United States Senate, at least in broadcasting matters, seems to view the society as a commercial monolith. This paper is a report of this conflict of attitudes concerning broadcasting between important legislative and administrative figures.

In the internal conflicts of American society during these times of stress, some peculiar alliances have formed. On one hand, the Vice President and the liberal members of the Federal Communications Commission are saying virtually the same thing: types of programming representing diverse viewpoints must be encouraged. The intellectual community is upset with Agnew because of his politically conservative motivations--he desires less criticism of the President. On the other hand, the elected legislators seem to be encouraging bland conformity in broadcast material. And although the liberal alliance has won often in the past few years, recent appointments by the Nixon administration to key administrative and judicial posts suggest that the encouraging forces of free expression may be outnumbered very soon.

A series of historical accidents in this country shaped the electronic mass media. The size of the allotted broadcast band, the development of advertising as the primary source of financing, and the control large networks have over most programming tended to lead the broadcasting industry toward economic, political, ethnic, and cultural monism. In the interest of freedom of mass expression and, more accurately, the freedom of mass learning, this monologue-producing set of circumstances offers the American listener few alternatives for examination.

However, electronic journalism, particularly FM radio, has developed alternatives to the standard commercial broadcast forms. One of these forms, called here "open forum radio," has the unique feature that it supports its operations by donations directly from the listeners. In this manner the operation does not depend upon a series of commercial contracts made with sponsors, a year-to-year arrangement with an outside foundation, nor funding from a governmental agency that is always at the mercy of legislative appropriations. All of these "open forum" stations are FM outlets, some operating on educational channels, others on channels designated by the Federal Communications Commission for commercial usage.

The largest and oldest consortium of these "open forum" outlets is the Pacifica Foundation which owns and operates four stations in Berkeley and Los Angeles, California; New York City; and Houston, Texas. The Foundation also operates a studio in Washington, D. C., and has applied for a broadcast license in that city. The programming philosophy of the Pacifica Stations may be summarized by a recent statement by Elsa Knight Thompson, Program Director of KPFA in Berkeley:

> Pacifica Foundation was created to implement the "Fairness" doctrine [of the FCC] on the air rather than on paper. Our more difficult and thankless task down through the years has been to contact and bring to the microphone speakers representing all relevant attitudes on [sic] the body politic. We have done so far in advance of the "popular" media in case after case, sometimes years in advance.
>
> I can only speak with authority about KPFA but I believe it applies to all Pacifica stations that we have, in the accurate sense of both words, been "issue" oriented, not "politically" oriented. In dealing with war and peace, race relations, the student movement, and ecology for example, it has been done in terms of the issues themselves and not in terms of parties or candidates espousing any special view regarding them.[1]

This programming philosophy would seem to be what Spiro Agnew would desire: to avoid ". . . instant analysis and querulous criticism."[2] When one realizes that most of Pacifica's public affairs programs are produced and executed by knowledgeable subscription holders, one concludes that it is radio controlled directly by its listeners.

While the administration is criticizing the news programming of networks and seeming to suggest alternative modes of news presentation, the United States Senate, through its Communications Sub-committee of the Commerce Committee, is engaged in harassment of Pacifica Foundation. To this author, the most "clear and present danger" of airwave censorship comes not from the administration, but from bi-partisan legislation and influence. Although the proposed amendments to the licensing regulations of the communications act, called the Pastore Bill, constitute a threat to freedom of electronic speech (and this was the majority opinion of the FCC before recent

membership change), the sub-committee revealed some unusual attitudes on December 1, 1969. The Communications Sub-committee, chaired by Senator John O. Pastore, had called all seven Federal Communication Commissioners to hear their testimony on the proposed Pastore Bill. The legislative arm of the Federal Government had a rare confrontation with the administrative arm.

A "preliminary matter" was introduced by Senator Pastore at the beginning of the session. Earlier in the year the FCC had renewed the Pacifica license of WBAI, New York City, and had conditionally granted the license of KPFI, Houston, Texas. These actions were taken despite a complaint about an obscene poem being read on KPFK, a Pacifica station in Los Angeles, in September of 1969. The poem "Jehovah's Child" described acts of fellatio being performed on and by Jesus Christ. The poem had been read or somehow used in an English class at Los Angeles Valley College. As a result, two teachers, including the author of the poem, were fired. (Both teachers were later reinstated.) A local controversy resulted and KPFK scheduled a late Sunday evening roundtable discussion of the poem and the controversy. The poem was read on the air in order to clarify the discussion, but only after many warnings that the poem might be offensive to some listeners. This issue of obscenity and the Pacifica Foundation was the "preliminary matter" raised by the Sub-Committee. In the printed transcript, a total of thirty-two pages were devoted to Pacifica, while nine pages, excluding documentation read into the record, were devoted to S. 2004, ostensibly the reason why the commissioners were present.

Senator Pastore had learned of the controversial broadcast from the Junior Senator from Florida, Edgar J. Gurney. Commissioner Robert E. Lee had dissented on the granting of the Houston license on the basis of the reading of "Jehovah's Child" on KPFK in Los Angeles. Lee's argument was based upon section 1462 of the U. S. Criminal Code, which makes the uttering of an obscenity or profane language by means of radio communication a criminal offense. The FCC had on previous occasions asked the Justice Department to prosecute amateur and marine radio users on charges of breaking this statute. Commissioner R. E. Lee argued that if shrimpboat captains are prosecuted, Pacifica Foundation employees should be punished. He did not mention the community controversy surrounding the poem. Further, he testified, "There are a number of complaints about Pacifica in our file."[3]

Commissioner Cox had voted with the majority of the FCC concerning the Houston permit and told the committee that he had done so because the poem had been read after 10:30 p.m. and had been presented in a public controversy context. Further, Cox testified that the Department of Justice did not feel that the poem appealed to prurient interests. Cox defended Pacifica's programming concept:

> I think if you were to look at the program schedule of one of these stations, you would find it highly commendable. It is making an effort to provide a range of services for its audience that all too often is lacking on commercial stations.

This is made possible by the fact that these stations are not supported by advertisers. They depend entirely upon finding an audience which is pleased with their service to the extent that they will send in voluntary subscriptions to pay for it.[4]

Senators Burney, Hugh Scott, and Pastore, upset, pressed on with the obscenity issue. Again, from the transcript:

Senator Gurney. What is the overall service Pacifica Stations perform? I'm curious about that.

Mr. Cox. I tried to describe it earlier.

Senator Scott. Which way do you use "service," the service they perform?

Mr. Cox. I think it is a true service to the community. I think if you were to examine their program schedule, you would find that ninety-nine percent of it was quite inoffensive, of a high character, and obviously in the public interest.

Within the course of doing this, because they are committed by their charter to a very broad educational effort, they present people all the way from Communists to John Birchers, and they get complaints from each extreme when the other is being heard.

Senator Scott. It sounds like to me that they present dirty language.

Mr. Cox. I think that there is some filthy language on this station. I hear, or see, evidence of filthy language on other stations. I wouldn't say "filthy" so much as language that people find offensive.

I think we live in a very diverse country. We have people with highly different degrees of sensibility. We have people who are offended by words which I am sure would not offend you and me.

Senator Scott. You mean you could use more dirty words if a Washington station station gets the license than you could in Houston?

Mr. Cox. I'm not sure that follows from what I said, Senator.

. . . . . .

Senator Pastore. The thing that is disturbing me here this afternoon is the general attitude. . . .

Today you are expressing an attitude of helplessness with regard to this permissiveness, and obscenity. You are saying you are almost powerless. You are saying here unless the Attorney General can prosecute under the criminal law, you are almost obliged to renew a license, that you cannot question it, because you are not sure in your minds what obscenity really means. We are losing sight here of common sense.

We, as grownup people, know what obscenity is. We know what art is, and we know what obscenity is. When you have a station here that puts a record with four-letter words, and then does it again and again and again, and you come before this committee and say, "We have received more complaints against this particular station than any others, but we renewed their license, or we gave them a new license," that, to me, is permissiveness even on the part of this commission. And it frightens--it frightens me no end.[5]

From even a casual reading of the record, one would note that none of the Senators had considered the socio-political context surrounding the episode of "Jehovah's Child," or the broad range of Pacifica's offerings. It seems obvious that the committee was simply reacting to their constituency's letters without listening to the stations or even examining program schedules.

However, the Senators were quite aware of at least one political dimension. Again, from the transcript:

> Senator Gurney. Don't you think it would be a good idea if you found out the sources of funds for the Pacifica stations?
>
> Mr. Cox. If we had a . . .
>
> Senator Gurney. Particularly in view of your testimony that Pacifica broadcasts communistic material as well as other stuff.
>
> Mr. Cox. My statement was they broadcast an entire range. I would suppose that, under your suggestion, we would have to investigate their broadcasting of the extreme right wing as well. My view . . .
>
> Senator Gurney. I would think you would investigate that. I should think you would find out what all sources of revenue were, particularly since they are such a controversial outfit.[6]

In a lead article entitled "Air Wave Pollution," Barron's Weekly, published by Dow Jones, questioned Pacifica's sources of revenue.[7] The article mentions that some

organizations which reactionaries consider questionable, such as the Consumer's Union Foundation, The Fund of the Republic (which supports the Center for the Study of Democratic Institutions) and the Ford Foundation, have given grants to Pacifica. Also, Barron's made the same mistake of Pastore's committee by suggesting that the station supports the ideology of Radio Hanoi, Combatants in the People's Park disturbance, the Black Panthers, members of the Resistance, alleged and former members of the American Communist Party and other "movement" groups simply by giving these participants access to a radio microphone. Copies of this issue of Barron's were distributed free at the National Association of Broadcasters Convention on the eve of Pacifica's Washington license hearing.

To this article, Mr. Al Silbowitz, Manager of KPFA, replied:

> Pacifica's licenses to broadcast are in danger, as the Barron's article indicates. Not because we are guilty of being controversial--we are proud of that. Nor because we allow voices of alienation and dissent to express themselves without emasculation--this function is explicitly protected by the Constitution. Pacifica is in danger, rather from the self-serving politicians who would play demagogue and betray ideals to which they only pay lip service.[8]

The danger of censorship through FCC licensing is imminent. One of the primary spokesmen for alternative forms of broadcasting is Kenneth Cox, whose term of appointment to the FCC expires soon. The newly appointed chairman of the commission is Dean Burch, who has made public statements on how bad he feels about broadcast obscenity. The FCC is becoming more conservative as replacement appointments are made by the Nixon administration. But, more importantly, the legislature is considering making changes in the licensing procedures. If these changes reflect the attitudes of the Communications Sub-committee, the FCC will be given instructions on how to behave toward the newer forms of broadcast media.

Perhaps the most current de facto censorship is that broadcast management carefully scrutinizes any Congressional or FCC attitudes and uses these judgments to influence their employees to proceed with caution in certain "sensitive" areas. The owners of another alternative radio form, "underground stations," have imposed self-censorship on their program content reasoning that the FCC might create problems for them.[9]

Only if the FCC vigorously upholds First Amendment principles will our country's broadcasting industry be able to withstand the philosphy of Senator Pastore:

> A well informed people are a well armed people. We like to believe that the image of America--with its rise to power and prosperity within two centuries of

its freedom--is one to inspire all nations to choose political courses that will lead toward a sound economy. There are also areas at home which seem to need indoctrination before they can share in the opportunities and responsibilities in the second half of the twentieth century.[10]

A democratic populace needs to be well informed, if only to withstand internal demagoguery. In order to become well informed, citizens must be able to be exposed to a wide range of viewpoints. Pastore's idea of monologic indoctrination is antithetical to the freedom to teach and learn.

FOOTNOTES

[1]KPFA Special Report, KPFA Folio, August, 1970.

[2]Spiro T. Agnew, "Television News Coverage," Vital Speeches, 36 (December 1, 1969), 98.

[3]"Amending the Communications Act of 1934 to Establish Orderly Procedures of the Consideration of Applications for Renewal of Broadcast Licenses." Transcript of Sub-committee on Communications, Committee on Commerce, U. S. Senate, December 1, 1969. U. S. Government Printing Office, p. 347.

[4]Ibid., p. 350.

[5]Ibid., p. 362.

[6]Ibid., p. 365.

[7]April 6, 1970.

[8]Special mailing to KPFA subscribers, May, 1970.

[9]"FM Underground Radio: Love for Sale," Rolling Stone, 55 (April 2, 1970), 1 ff.

[10]John O. Pastore, The Story of Communications (New York: MacFadden, 1964), p. 8.

THE CRISIS IN PUBLIC CONFIDENCE IN PUBLIC COMMUNICATION

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Martin Buber, in a speech in 1952, lamented the increasing distrust of truthfulness in communication between men. Said Buber: "One no longer merely fears that the other will voluntarily dissemble, but one simply takes it for granted that he cannot do otherwise."[1] Today this problem of distrust in communication grows ever more acute.

Whether the message goes from government to governed, political candidate to voter, news media to citizen, or advertiser to consumer, mutual confidence and trust are vital for complete communication. Yet now we witness a mounting crisis in public confidence in truthfulness of public communication. If such public confidence is a goal or value integral to the optimum functioning of American representative democracy, it is a goal being less and less attained.

W. Barnett Pearce recently has reminded us of the interrelationship between the right of free speech and the people's right of access to information.[2] A rising tide of distorted information, censored information and untruthful information can lead to mistrust between communicators which in turn can lead either to non-conciliatory rhetoric or to avoidance of communication. And avoidance of communication undermines the right of free speech.

Democratic decision-making through vigorous and free debate of issues assumes maximum access to accurate and trustworthy information. Strong democratic processes are rooted in adequacy of information, diversity of viewpoints, and knowledge of potential effects of alternative choices.[3] In Crisis in Credibility, Bruce Ladd argues: "Access to information about government is required for the democratic system to work successfully. . . . A government whose leaders cannot be believed runs the risk of losing the privilege of representing the people, and the people risk losing the contest between democracy and despotism."[4] When the veracity of government pronouncements, campaign speeches, news reports, or advertising appeals becomes widely questioned, public confidence in the processes of democracy and free enterprise are dangerously shaken.

Presently in the arena of political protest we witness a turning from persuasive approaches based on conciliation and identification of common interests to an agressive, abrasive, non-conciliatory rhetoric of confrontation. One of the assumptions

underlying confrontation rhetoric is that the traditional channels and modes of communication are inadequate. This inadequacy, so the argument goes, stems from methods which are too slow, channels which are inaccessible to aggrieved segments of the public, an Establishment which will not listen, and an Establishment which cannot be trusted to communicate truthfully.

In the Journal of the American Forensic Association, this problem is discussed by Lee W. Huebner, a member of President Nixon's White House research and writing staff.[5] There is increasing correctness in Huebner's conclusion: "So it is that many members of our society have become less willing in recent years to trust the persuasive process. Their confidence in public judgment has been weakened and they are reluctant to submit questions to open debate."

Weakening of public trust in communication from the government, political candidates, news media, and advertisers is evident. In 1962 Arthur Sylvester, Assistant Secretary of Defense for Public Affairs, caused both controversy and disillusionment with his assertion that "it is the government's inherent right to lie if necessary to save itself when faced with nuclear disaster; that is basic."[6] One response came from military affairs analyst Hanson W. Baldwin: "There was a time when the word of the government was its bond; the people could have faith, allowing for mistakes and erroneous interpretations, in what Washington told them. Public confidence has been severely shaken many times since World War II."[7]

Citizens today more and more complain of "managed news" and a "credibility gap" in communication from the federal government.[8] They tend to dismiss as untrue, without analysis, much governmental communication. During political campaigns citizens also dismiss many speeches, often characterized by gross hyperbole, as "mere campaign oratory." They have so little confidence in campaign persuasion that they believe a substantial portion of it is not worthy of thoughtful scrutiny. Concerning communication in advertising and public relations, Colston Warne alerted those at the American Economic Association's annual meeting in 1962 to the "crisis of confidence in almost the whole range of marketing practices" and concluded that "consumer confidence in advertising and selling has been badly shaken."[9]

Syndicated news columnist Bruce Biossat points to the "worsening epidemic of distrust" in public communication. Biossat summarizes the problem clearly: "The contagion has reached the point where many Americans no longer try seriously to determine when they are hearing at least approximate truths and when they are not. They simply retire to the fragile comfort of believing that nothing is to be believed."[10]

Public opinion polls tend to reflect our growing pessimism about honesty in general and truthfulness in public communication in particular.[11] A Gallup Poll in 1968 indicated that sixty-one percent of the national sample believed that life is getting worse in terms of honesty. Two Gallup Polls in 1967 revealed that sixty-six to seventy percent of the national sample felt that the Johnson administration was not telling the

public all it needed to know about the Vietnam war. And a Gallup Poll late in 1969 explored whether the public believed that newspapers and television networks deal fairly with all sides or tend to favor one side in presenting news on social and political issues. Forty-two percent felt that television and forty-five percent that newspapers favor one side in presentation.

According to Newsweek, a national poll taken by Louis Harris and Associates indicated fifty percent support of President Nixon's decision to send troops into Cambodia.[12] More important, however, the same poll revealed a serious lack of public confidence in Presidential communication. Only twelve percent believed the President's assurance that all American forces would be withdrawn from Cambodia by the end of June. Forty-nine percent doubted that Nixon would remove 150,000 men from Vietnam by the spring as he promised. Forty-six percent thought the President had "not been frank and straightforward about the war."

That public confidence in truthfulness of communication from both the press and the government is dangerously low is the view of former Presidential press secretary Bill Moyers.[13] When addressing the William Allen White Centennial Seminar in 1968, Moyers bluntly observed: "The deepest crises are not Vietnam and the cities but cynicism about political order and corroded confidence in our ability to communicate with one another and to trust one another." To support his view, Moyers cited the analysis of James Reston:

> The fundamental issue is the question of trust. The most serious problem in America today is that there is widespread doubt in the public mind about its major leaders and institutions. There is more troubled questioning of the veracity of statements out of the White House today than at any time in recent memory. The cynicism about Congress is palpable. The disbelief in the press is a national joke. . . . There is little public trust today.[14]

Writing in the New Republic, Hans J. Morgenthau contends that such lack of trust extends beyond official statements on Vietnam to all matters of public concern:

> For deception is being practiced not occasionally as a painful necessity dictated by the reason of state, but consistently as a kind of lighthearted sport through which the deceiver enjoys his power. . . . Yet a democratic government cannot rule effectively, and in the long run it cannot rule at all, if it is not sustained by a modicum of freely given support of the people and their elected representatives.[15]

What are the effects of weakened public confidence in truthfulness of public communication? Sincere human communication in thwarted and democratice decision-

making processes are hampered. Alienation from the System and a polarization of attitudes increase. Distrust and suspicion poison a widening variety of human relationships.

Untruthfulness in some advertising tends to breed consumer distrust in all advertising. The long run economic effects of such distrust could be disasterous. Nicholas Samstag, in Persuasion for Profit, issues a pragmatic warning against toleration of misrepresentation because each distortion "dilutes to some extent the credibility of all advertising."[16] In their standard college textbook on advertising, Advertising Theory and Practice, C. H. Sandage and Vernon Fryburger summarize the potential consequences: "If advertising does not have the confidence of most consumers, it will lose its influence and surely die. If people grow to disbelieve a substantial percentage of the advertising messages that come to them, they will soon reject most or all advertising."[17]

The consequences of distrust in public communication pose the most danger in the areas of social stability and political life. Over twenty years ago sociologist Robert K. Merton sounded the warning in his classic Mass Persuasion:

> No single advertising or propaganda campaign may significant affect the psychological stability of those subjected to it. But a society subjected ceaselessly to a flow of "effective" half-truths and the exploitation of mass anxieties may all the sooner lose that mutuality of confidence and reciprocal trust so essential to a stable social structure.[18]

And Bill Moyers believes that cynicism about communication from the press and government "ultimately will infect the very core of the way in which we transact our public affairs; it will eat at the general confidence we must be able to have in one another if a pluralistic society is to work."[19]

In the political life of the nation, alienation of the voter may be the outcome of distrust in public communication. Bruce Felknor, former director of the non-partisan Fair Campaign Practices Committee, contends in his book Dirty Politics: "The real danger lies in warping the channels of political communication; in confusing the real differences between men; in twisting facts so that voters give up in dismay and vote blindly or stay at home. The danger, finally, is alienation of the electorate from the political system."[20] In their analysis of news management in Washington, Anything But the Truth, William McGaffin and Erwin Knoll underscore the peril:

> As much as the Vietnam war or the urban crisis or any other specific problem in American life, the Credibility Gap contributes to the spreading disaffection and alienation among thoughtful citizens. Increasingly they seem incapable of

the act of faith required to believe in America when America's government cannot be believed.[21]

The very health of American representative democracy is at stake. Bruce Ladd clearly highlights the crucial nature of government's credibility:

> To the extent that a government is believed, it will function effectively. To the extent that a government is doubted, it will inevitably fall short of its goals. The widening scope of government secrecy, lying, and news management, therefore, contributes to a trend that threatens the basis of democracy. When government's credibility is impeached, democracy is diminished.[23]

What suggestions might be offered to help stem the decline of trust in public communication? On the Washington scene, McGaffin and Knoll urge as a first step the establishment of regular, scheduled, no-holds-barred Presidential news conferences.[23]

Just as other values and goals essential to the optimum functioning of our political system may be used as standards for judging the ethics of communication, so too we must employ the goal of public confidence in truthfulness of public communication as an ethical yardstick.[24] When contents or techniques of communication weaken or undermine confidence in public communication they must be condemned as unethical. That such action can help raise the level of public communication ethics is a belief of Bruce Felknor. Despite his exposure to "dirty politics" in campaign practices, he feels that "careful, thoughtful, critical listening to political argument, and citizen anger directed through the ballot box" can be effective.[25]

We must combat the growing assumption that most public communication inherently is untrustworthy. Just because a communication is of a certain type or comes from a certain source (government, candidate, news media, advertiser) it must not be automatically rejected as tainted or untruthful. Clearly we must always exercise caution in acceptance and care in evaluation. Using the best evidence available to us we may reach our judgment. But to condemn a message as untruthful just because it stems from a suspect source and before directly assessing it is to exhibit decision-making behavior detrimental to our economic and political system. Rejection of the message, if such be the judgment, must come after, not before, our evaluation of it. As with a defendant in the courtroom, public communication must be presumed innocent until we have proven it guilty.

The attitude to be promoted if we are to strengthen public confidence in truthfulness of public communication and to promote optimum free speech is stated eloquently by Dag Hammarskjöld in Markings:

Respect for the word--to employ it with scrupulous care and an incorruptible heartfelt love of truth--is essential if there is to be any growth in a society or in the human race. To misuse the word is to show contempt for man. It undermines the bridges and poisons the wells. It causes Man to regress down the long path of his evolution.[26]

FOOTNOTES

[1]Martin Buber, Pointing the Way (New York: Harper Torchbook, 1963), 223.

[2]W. Barnett Pearce, "On Fooling the People, Whether Some, Most or All of the Time: An Examination of the People's Right to Know," in Free Speech Yearbook: 1970, ed. by Thomas L. Tedford (New York: Speech Communication Association, 1970), 69-81.

[3]See, for example, Thomas R. Nilsen, Ethics of Speech Communication (Indianapolis: Bobbs-Merrill, 1966), 13.

[4]Bruce Ladd, Crisis in Credibility (New York: New American Library, 1968), 9. Ladd's book is a documented indictment of the federal government's executive branch for lying, unwarranted secrecy, and misleading news manipulation.

[5]Lee W. Huebner, "The Debater, the Speechwriter, and the Challenge of Public Persuasion," Journal of the American Forensic Association, 7 (Winter, 1970), 8.

[6]New York Times, December 7, 1962, 5. See also Arthur Sylvester, "The Government Has the Right to Lie," Saturday Evening Post, 240 (November 18, 1967), 10 ff.

[7]Hanson W. Baldwin, "Managed News," Atlantic, 211 (April, 1963), 57.

[8]See, for example, the analysis of Halbert E. Gulley, "The New Amorality in American Communication," Today's Speech, 18 (Winter, 1970), 3-8.

[9]Colston Warne, "The Influence of Ethical and Social Responsibilities on Advertising and Selling Practices," in Speaking of Advertising, ed. by John S. Wright and Daniel S. Warner (New York: McGraw-Hill, 1963), 383-384.

[10]Bruce Biossat, column in Bloomington, Indiana, Daily Herald-Telephone, December 12, 1969.

[11]For the following Gallup Polls see Gallup Opinion Index Reports for September, 1968, 27; May, 1967, 5; November, 1967, 5; January, 1970, 8-9.

[12]Newsweek, June 8, 1970, 24.

[13]Bill D. Moyers, "The Press and the Government: Who's Telling the Truth?" in Mass Media in a Free Society, ed. by Warren K. Agee (Lawrence, Kansas: University of Kansas Press, 1969), 36.

[14]Cited in Moyers, ibid., 20.

[15]Hans J. Morgenthau, "What Ails America?" The New Republic, 157 (October 28, 1967), 19-20.

[16]Nicholas Samstag, Persuasion for Profit (Norman: University of Oklahoma Press, 1957), 191.

[17]C. H. Sandage and Vernon Fryburger, Advertising Theory and Practice, 6th ed. (Homewood, Ill.: Irwin, 1963), 84.

[18]Robert K. Merton, Mass Persuasion (New York: Harper, 1946), 189.

[19]Moyers, 20.

[20]Bruce L. Felknor, Dirty Politics (Boston: Norton, 1966), 129.

[21]William McGaffin and Erwin Knoll, Anything But the Truth: The Credibility Gap--How the News is Managed in Washington (New York: Putnams, 1968), 35-36.

[22]Ladd, 9.

[23]McGaffin and Knoll, 183.

[24]For attempts at using democratic values and goals as standards for assessing the ethics of communication see the essays by Karl Wallace, Thomas Nilsen, Franklyn Haiman, and Sidney Hook reprinted in Richard L. Johannesen, ed., Ethics and Persuasion: Selected Readings (New York: Random House, 1967), 41-101.

[25]Felknor, 261.

[26]Dag Hammarskjöld, Markings (New York: Knopf, 1964), 112.

THE RESISTANCE AND THE COURT: THE PUNITIVE DRAFT CASES*

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Between October, 1968, and February, 1970, the United States Supreme Court handed down a series of decisions which effectively invalidated the use of the military draft to punish conduct prohibited by the Selective Service Regulations. The three most important of these cases, Oestereich v. Selective Service Local Board No. 11,[1] Gutknecht v. United States,[2] and Breen v. Selective Service Local Board No. 16,[3] involved young men who had abandoned their draft cards in protest against American military and foreign policy. And while the rulings affected all registrants who faced processing as draft "delinquents," it is with the war protesters that this paper will be concerned.

This paper will not look at the question of conscientious objection within the draft system--cases of persons who sought special classification as conscientious objectors--even in instances where denial of recognition by the draft board has been followed by refusal of induction into the armed forces. Instead it will focus on the so-called "non-cooperators," those men who return or destroy their draft cards and subsequently refuse to comply with Selective Service at all. In this group one should also include those eighteen-year-olds who publicly refuse to register. However, unless they are later registered in absentia (a not uncommon practice), they are not subject to any classification or induction, punitive or otherwise. (They are, of course, subject to prosecution.) Hence, this paper is concerned with those men who, having already registered, decided to end their compliance.

The Social and Political Setting

It is hard to determine exactly when the involvement of the United States in Vietnam became an undeclared war. Certainly during the Kennedy administration the American presence was more than "advisory." Likewise it is impossible to pinpoint the date of the first Vietnam antiwar protest, although the earliest visible ones took place in 1963, during the visit of Madame Nhu, sister-in-law of the soon to be assassinated President Diem. In April, 1965, the Students for a Democratic Society brought 15,000 demonstrators to the gates of the White House in what was to become the first of many marches on Washington. Four months later, several hundred persons sat-in on the lawn of the Capitol; 350 were arrested. Almost overnight the

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antiwar protesters became the most talked about phenomena in the nation. Newspapers and magazines joined in asking: Who are they? How many are there? What do they want?

As the antiwar movement grew, another dynamic was operating. During periods of military conscription in the United States, there has always existed a small number of non-cooperators, most of whom were motivated by religious beliefs. Since the end of World War II, however, a growth of politically motivated non-cooperation developed. In 1947, for example, a group of men gathered outside the White House to burn their draft cards in protest against the coming peacetime conscription law. Then in the early 1950's a Brown University drop-out named David Mitchell terminated his relations with his draft board. Unlike most non-cooperators at the time, even the distinctly non-religious ones, Mitchell expressed a rather "hard" line:

> In my own case, my draft refusal rests, not on an abstract philosophy, but on the political situation as it exists. I non-cooperate with my government, not because I am a pacifist or occupy a position somehow uninvolved with the world, but on the contrary because I am very involved and specifically condemn the United States for crimes against peace and humanity. I refuse to cooperate with any Koreas, Cuban invasions or blockades, Vietnams, or with the nuclear arrogance with which we threaten to blow up the world.[4]

Mitchell was eventually tried for failing to report for induction, but before he went to prison in the spring of 1967, he traveled around the country to speak at anti-war rallies and campus conferences. He can be credited with forging the crucial link between the small non-cooperation movement and the rapidly growing Vietnam antiwar movement. Mitchell, however, was upstaged by a set of circumstances beyond his control: the photographing of a draft card burner by a Life reporter followed by the frenzied enactment of Public Law 89-152 amending the Selective Service law to forbid the willful mutilation of draft cards. On October 15, 1965, only a month and a half after President Johnson signed Public Law 89-152, a clean-cut Roman Catholic youth named David Miller shocked the nation by standing outside the Whitehall Street induction center in New York City and setting fire to his brand new Notice of Classification. ("Draft card" is actually an unofficial term for the Notice of Classification and the Registration Certificate, both of which are issued to all registrants.) Three days later, as he stopped his car in rural New Hampshire to change a flat tire, Miller was arrested by six FBI agents. Despite this speedy apprehension, the fiery gesture caught on, and soon the entire country was heatedly discussing the "draft resister" with his curious amalgam of politics and audacity.

The same day that David Miller ignited his card, thirty-eight persons from the University of Michigan staged an obstructive sit-in within the offices of an Ann Arbor draft board. Several of the students who participated were soon stripped of their 2-S

deferments by their own local boards in what was the first widely publicized instance of punitive reclassification for an antiwar protest. More than a year later, in the case of Wolff v. Selective Service Local Board No. 16,[5] the Second Circuit Court of Appeals accepted a First Amendment argument and held that the protesters could not be reclassified even though their conduct violated both state and federal laws. The only legitimate punishment had to be through the courts. A major feature of the Wolff decision was that the judges departed from usual procedure and heard the case before the registrants had exhausted their remedies within the Selective Service System. Usually a person has to appeal his classification within the System. If unsuccessful, he can refuse to submit to induction and then, as a defense to prosecution, raise the claim that his classification was improper. An alternative for those who would rather risk two years in the army than five in jail is to submit to induction and then petition a federal judge for a release from service on a writ of habeas corpus. Congress, in what appears to be a reaction to Wolff, revised §10(b) (3) when it drew up the new Military Selective Service Act of 1967 so that pre-induction judicial review of classifications would be expressly forbidden.

During the summer of 1967, several dozen antidraft groups sprang up around the United States, most of them located on college campuses or in cities with large student populations. Calling themselves "the Resistance," these local groups planned a nationwide draft card turn-in to be held on October 16 of that year. While the politics of the Resistance represented a heterogeneous mixture, the one tactic of non-cooperation was universally accepted. As a leaflet issued by the Berkeley Resistance put it: "We have chosen to openly defy the draft and confront the government and its war directly." When October 16 arrived, thousands of persons attended a rally on the Boston Common followed by a march to the century-old Arlington Street Church where, one by one, more than 300 young men approached the pulpit to either burn their draft cards at the alter candle or deposit them in the collection plate. Among these men stood a Wyoming-bred divinity student named James Oestereich. Meanwhile, halfway across the country, twenty registrants tried to deliver their cards to the United States Marshal in Minneapolis; when he refused to accept them, they dropped the 2 1/2-by-3 1/2-inch documents at his feet. One of the twenty was a full-time radical activist named David Gutknecht. Exactly one month later, forty young men participated in a supplemental turn-in sponsored by the Boston (or New England) Resistance at the Old West Methodist Church. Among them was an undergraduate music student named Timothy Breen.

The government responded quickly to the Resistance. On October 24, 1967, Selective Service Director Lewis B. Hershey issued his infamous Local Board Memorandum No. 85 which recommended that whenever a registrant abandoned or mutilated either of his draft cards, his local board should declare him "to be a delinquent for failure to have the card in his possession," reclassify him "into a class available for service as a delinquent," and finally order him to report for induction (or, in the case of a recognized conscientious objector, for civilian work) "as a delinquent." Officially, what the Memorandum did was call the attention of the local boards to those sections of

the Selective Service Regulations which defined as a "delinquent" any person "who fails or neglects to perform any duty required of him,"[6] required the possession of both draft cards,[7] and provided for the reclassification of most delinquents and their induction before all other eligible registrants.[8]

Many boards wasted no time in acting upon the Director's recommendations. Scores of Resistance participants began to receive Delinquency Notices and 1-A (available for service) classifications at once. In a few instances local boards intent on following the Memorandum obviously exceeded their authority. For example, several registrants past their thirty-fifth birthdays had their 5-A (overage) classifications removed even though the Regulations allowed only for the reclassification of draft-age delinquents.[9]

Two days after issuing Memorandum No. 85, Hersey mailed a letter to all local boards suggesting that a registrant who violates any portion of the Act of the Regulations be treated as a delinquent. Unlike the Memorandum, the "Hershey letter" was not an official document, and its existence is known about only via articles in the New York Times of November 8 and 9, 1967. This letter was incompatible with the Wolff decision, for it recommended reclassification of those who hindered the physical operation of the draft, as well as those who failed to perform some required duty. Fortunately, very few boards followed such recommendations, and with perhaps four or five exceptions, some of which were well publicized, the only war protesters declared delinquent were those who rid themselves of their draft cards. In any event, the Hershey letter was later voided by the District of Columbia Circuit Court of Appeals in the case of National Student Association v. Hershey,[10] in which the Court held that other than "violations covered by the delinquency regulations . . . a registrant's protest activities are not to be considered in determining his Selective Service classification." Failure to maintain possession of one's draft cards was, as previously mentioned, a violation explicitly covered by the Regulations.

The Legal Counterattack

On December 1, 1967, at a press conference in New York, the American Civil Liberties Union, speaking through its executive director, John Pemberton, Jr., announced the beginning of a series of lawsuits attacking punitive reclassification as a violation of the First and Sixth Amendments. Among the plaintiffs would be three clergymen, a college student, and a Marine Corps veteran, all of whom were declared delinquent after returning their cards to the government. A spokesman for the National Council of Churches indicated that his organization would join in the support of the three clergymen, one of whom, Rev. Henry H. Bucher, was a member of their Department of Higher Education. A day later, the National Student Association revealed that, with the help of the ACLU, it would challenge both Local Board Memorandum No. 85 and the Hershey letter. By the end of the month, the ACLU and its various local affiliates had accepted approximately thirty cases of punitive reclassification; throughout 1968 they would accept many more.

One of the first suits to be heard was Oestereich's. On January 22, 1968, ACLU legal director Melvin Wulf joined John King, a local cooperating attorney, in asking the United States District Court for the District of Wyoming to restrain the Selective Service from inducting their client. On February 6, in a decision which rested heavily on the Congressional prohibition of pre-induction judicial review, the judge dismissed the delinquent registrant's complaint.[11] A mere fifteen days later the dismissal was affirmed by the Tenth Circuit Court of Appeals.[12] Supreme Court Justice White, however, stayed Oestereich's threatened induction, and on March 19 a petition for certiorari (review) was filed with the Court claiming that punitive reclassification was an unconstitutional abridgement of free speech and denial of due process. The ACLU lawyers argued, furthermore, that since such important constitutional issues were raised, §10(b) (3) of the 1967 Act could not bar jurisdiction.

Less than a month after Oestereich's petition for a hearing was filed, United States Solicitor General Erwin Griswold surprised both the ACLU and Selective Service. In his memorandum for the respondents (filed to answer the petition) he argued that no constitutional issues really existed, that the delinquency procedures were not punitive (but, like civil contempt procedures, coercive), and that §10(b) (3) was valid. However, in a highly unusual move, Griswold added:

> Quite apart from the validity of the arguments made above, there is a further problem in this case. Although the issue is not advanced directly by counsel for the petitioner, it is apparent on the face of the record. It does not appear to be a matter which can be appropriately overlooked.
>
> In this case, petitioner's exemption from military service and training is one which has been granted to him by Act of Congress . . . .
>
> Petitioner is a full-time student in good standing at the Andover Newton Theological Seminary, which is a "recognized theological or divinity school." Thus, he is exempt by terms of the statute from "training and service" under the Selective Service Act. What Selective Service Local Board No. 11 has done here is to terminate, by administrative action, the exemption which has been granted by statute.

The Solicitor General concluded not by asking that certiorari be denied, but by suggesting that the lower courts' judgments be reversed and that the case be "remanded with directions to hold a hearing as to the presence of the jurisdictional amount required by 28 U.S.C. §1331, and if jurisdiction under that section is found, to enter a decree in favor of the petitioner . . . ." (28 U.S.C. §1331 requires that for a federal court to accept jurisdiction, the amount in controversy exceed $10,000. This was a technicality as far as punitive reclassification suits went, for the government never contested the stipulation of the requisite amount in the registrants' complaints.)

The reactions to Griswold's memorandum were immediate. Melvin Wulf soon pointed out that an undergraduate 2-S deferment, like the 4-D exemption for ministerial students and clergymen, was mandated by Congress. On April 22, 1968, a District Court judge in the Southern District of New York accepted this 2-S/4-D analogy and enjoined the induction of a student who was one of several plaintiffs in Kimball v. Selective Service Local Board No. 15,[13] a New York Civil Liberties Union case. A similar ruling was made a month later by a judge in the Eastern District of New York in Linzer v. Selective Service Local Board No. 64,[14] another NYCLU case. Finally, Hershey, upset over the lack of support he received from the Solicitor General, decided to submit his own memorandum asking that certiorari be denied, but he was blocked from doing so by the Justice Department. On May 20, the same day the trial of Dr. Spock and his codefendants began in Boston, the Supreme Court agreed to hear Oestereich's case and set it down on the calendar for the next term.

Whatever hopes were raised among the Resistance and the ACLU were dashed one week later. On May 27 the Supreme Court refused to stay the inductions of two men who had been declared delinquent for turning in their draft cards.[15] In a more important ruling the same day, United States v. O'Brien,[16] the Court upheld the 1965 statutory ban on draft card mutilation. While the Regulations which required possession were not specifically ruled upon, Chief Justice Warren's majority opinion left little doubt that turning in a draft card could hardly be seen as protected free speech. To make matters worse, two weeks after O'Brien the Court declined to review a case in which an induction refusal conviction had been affirmed by the Ninth Circuit in face of a First Amendment challenge to the delinquency procedures.[17]

The brief for James Oestereich was put together by a select group of civil liberties lawyers, including Melvin Wulf and his assistant, Eleanor Holmes Norton, now Human Rights Commissioner of New York City; draft law experts Michael Tigar and Marvin Karpatkin: NYCLU counsel Alan Levine; Prof. Lawrence Velvel of the University of Kansas Law School; and Prof. John Griffiths of Yale Law School. Together they argued that their client's freedom of speech had been violated, and that the punitive use of the draft was unconstitutional, not authorized by any statute, and not authorized by the Selective Service Regulations. Furthermore, they maintained that since constitutional issues were raised, §10(b) (3) could not bar jurisdiction. The government's brief, prepared by the Solicitor General and his staff, contested all of these arguments. However, it went on to add that it was questionable whether Oestereich's reclassification was lawfully authorized, and asked that review be given to reconcile §10(b) (3) with the Congressional mandate that divinity students be draft exempt. Thus both sides were asking for a ruling favorable to the plaintiff Oestereich. The ACLU, however, tried to launch a constitutional attack, while the Solicitor General merely maintained that the reclassification of divinity students was not authorized by the draft law. No amicus curiae briefs were entered.

Wulf and Griswold argued the case before the Supreme Court on October 24, 1968, the first anniversary of Local Board Memorandum No. 85. On December 16

the Court announced its six-to-three decision. The heart of the majority opinion, written by Justice Douglas, rested heavily on Griswold's views:

> Once a person registers and qualifies for a statutory exemption we find no legislative authority to deprive him of that exemption because of conduct or activities unrelated to the merits of granting or continuing that exemption. The Solicitor General confesses error on the use by Selective Service of delinquency proceedings for that purpose.
>
> We deal with conduct of a local Board that is basically lawless. . . . The case we decide today involves a clear departure by the Board from its statutory mandate. To hold that a person deprived of his statutory exemption in such a blatantly lawless manner must either be inducted and raise his protest through habeas corpus or defy induction and defend his refusal in a criminal prosecution is to construe the Act with unnecessary harshness. As the Solicitor General suggests, such literalness does violence to the clear mandate . . . governing the exemption. Our construction leaves §10(b) (3) unimpaired in the normal operations of the Act.

The Court's final order in Oestereich was to reverse the Tenth Circuit's ruling and send the case back to Wyoming for a hearing. One thing was left perfectly clear: neither James Oestereich nor any other registrant entitled to a statutory draft exemption could be ordered for induction under the delinquency procedures.

During the year which followed, the ACLU and its affiliates (as well as other attorneys engaged in Selective Service litigation) attempted to extend the scope of Oestereich in the lower federal courts while waiting for the Supreme Court to take up the issue of punitive reclassification once again. Timothy Breen's case was the first to arise. On January 10, 1969, in a two to one decision, the Second Circuit Court of Appeals distinguished between "statutory exemptions" and "statutory deferments," and denied relief to the plaintiff who had lost his 2-S.[18] Almost at once, Melvin Wulf joined Connecticut CLU cooperating attorneys Emanuel Margolis and Lawrence Weisman, who had handled the case of the District and Circuit levels, in asking the Supreme Court for certiorari. Ten days after the Breen ruling, the Eighth Circuit upheld the induction refusal conviction of David Gutknecht.[19] The notable fact about the case is that Gutknecht was never reclassified, for he had already been 1-A when he received his Delinquency Notice. He was simply called out of turn, ahead of all other registrants. Because of this lack of punitive reclassification, the Appeals Court refused to apply Oestereich. However, since Gutknecht was a post-induction criminal prosecution, §10(b) (3) of the 1967 Act presented absolutely no barrier to judicial review. Handled on the trial level by Minnesota CLU cooperating attorney Chester Bruvold, the case had attracted the attention of Wulf, who helped the MCLU write an amicus brief for the Circuit Court. After the unanimous defeat a certiorari petition was filed. On April 28, 1969, the Supreme Court agreed to hear both Breen and Gutknecht.

For the entire year courts around the country issued a variety of opinions. For example, on January 28 the Eighth Circuit, in Kolden v. Selective Service Local Board No. 4,[20] ruled that Oestereich did not protect a graduate student's 2-S. A similar ruling was made with regard to the 3-A hardship deferment by the Fourth Circuit on March 13 in Kraus v. Selective Service Local Board No. 25.[21] On the other hand, in a pair of cases decided together on November 7, Worstell v. United States and Demangone v. United States,[22] the Third Curcuit reversed the convictions of two induction refusers who had lost their student deferments when they turned in their draft cards. None of the many rulings made in 1969 set any consistent precedent. Petitions for certiorari were filed in several of them, and it became clear that the Supreme Court could not avoid making a broad, substantive decision.

The brief for Timothy Breen was prepared by Margolis, Weisman, Tigar and Wulf; the brief for David Gutknecht by Bruvold, Tigar, and Wulf. Amicus curiae briefs were filed in favor of both resisters by the American Jewish Congress, and in favor of Gutknecht by the Central Committee for Conscientious Objectors. Breen's brief made only one basic point: no significant differences exist between a Congressionally mandated exemption and a Congressionally mandated deferment. Gutknecht's brief was more complicated; it argued that the delinquency procedures were not authorized by statute and were in violation of the First, Fifth, and Sixth Amendments. There was one serious flaw that had to be overcome, however. Section 6(h) (1) of the 1967 Act, which governed student deferments, contained a provision using the term "prime age group" which it defined as the "group from which selections for induction . . . are first to be made after delinquents and volunteers." It could logically be assumed that if no question of reclassification were involved, and none was in Gutknecht, some authority did exist for drafting delinquents ahead of others. Gutknecht's lawyers therefore brought up a point touched upon by Justice Douglas in Oestereich: Congress had created no guidelines by which delinquency could be judged. The government's briefs argued, as one might expect, that the delinquency procedures were valid and that in Breen's case review was barred by §10(b) (3). The Solicitor General's name did not appear on the government's briefs. Although Griswold has never publicly stated why he did not sign them, one can guess that either he sided with the resisters and their lawyers, or, after what he had done in Oestereich, the Justice Department paid deference to Selective Service and removed him from the case. Breen was heard before the Supreme Court on November 19, 1969, with Emanuel Margolis facing Assistant Attorney General William Ruckelshaus. Michael Tigar and Ruckelshaus argued Gutknecht the following day.

Before the Supreme Court got around to handing down rulings in Breen and Gutknecht, the Third Circuit Court of Appeals acted on a related case. On January 2, 1970, it announced its decision in Bucher v. Selective Service Local Board No. 7,[23] a case initiated on behalf of Rev. Bucher by the ACLU. Bucher had thrice been amended to include thirteen additional plaintiffs. Both the ACLU and its New Jersey affiliate had put much effort into the case, and the Justice Department took it seriously enough to have it argued by Ruckelshaus rather than the local United States Attorney. The jist of the remarkable ruling was that the Regulations providing for the reclassification and

accelerated induction of delinquents not only lacked statutory authorization, but also violated the Constitution for they imposed summary punishment without the due process guarantees of the Fifth and Sixth Amendments. Although one of the three judges dissented in part, Bucher was the firmest and the most sweeping decision made by any court with regard to the use of the draft as punishment.

The Supreme Court announced Gutknecht on January 19, 1970. There was no dissent, although four of the justices indicated that they did not entirely agree with the majority opinion, written again by Douglas, which held the delinquency procedures invalid for lack of statutory authorization. Justice Douglas dealt with the problem of §6(h) (1), in which Congress had used the term "delinquents," as follows:

> This reference concerns only an order-of-call provision which institutes a call by age groups, . . . a provision which had never been used. This casual mention of the term "delinquents," moreover, must be measured against the explicit congressional provision for criminal punishment of those who violate the selective service laws, . . . the congressional provision for exemptions and deferments, . . . and congressional expressions emphasizing the importance of an impartial order of call.

And he concluded:

> We search the Act in vain for any clues that Congress desired the Act to have punitive sanctions apart from the criminal prosecutions specifically authorized. . . . If induction is to be substituted for these prosecutions, a vast rewriting of the Act is needed. Standards would be needed by which the legality of a declaration of "delinquency" could be judged. And the regulations, when written, would be subject to the customary inquiries as to infirmities on their face or in their application, including the question of whether they were used to penalize or punish the free exercise of constitutional rights.

Thus the Supreme Court touched upon the constitutional issues raised by Gutknecht's lawyers; however, unlike the Third Circuit, it did not declare the delinquency procedures to be unconstitutional. David Gutknecht's conviction and four-year sentence were, of course, vacated, and the following day newspapers around the country carried a UPI photo of him sporting a wide smile while waving his fist defiantly before the Minneapolis Federal Building. Two days after the Court's decision, Lewis Hershey, in one of his last official acts as Selective Service Director, issued Local Board Memorandum No. 101 requesting that boards "suspend all processing of delinquents . . . pending a determination as to what action should be taken . . . ."

After the Gutknecht ruling, Breen, announced exactly one week later, had become a mere technicality, for it became obvious that the plaintiff could not lawfully be

ordered for induction as a delinquent. Therefore it was no surprise when the Supreme Court, without dissent but with two Justices concurring only in part, held that Oestereich protected young Breen's 2-S. In the words of Justice Black, writing for the Court:

> When Congress thus acted to replace discretionary standards with explicit requirements for student deferments, it did not specifically provide or in any way indicate that such deferred status could be denied because the registrant failed to possess his registration certificate.

Black went on to cite Gutknecht as to the invalidity of the delinquency procedures, reverse the judgment from the court below, and remand the case "for further proceedings in conformity with this opinion." The Selective Service System had lost to an undergraduate from the Berklee School of Music.

On February 24, 1970, the Supreme Court followed Gutknecht and Breen to the logical conclusion by taking up six civil cases to enjoin threatened induction[24] and two criminal cases in which delinquent registrants had refused to submit to induction.[25] Without argument, the judgments from below were vacated, and all eight cases were returned to their respective Circuits for consideration anew in light of the previous month's decisions.

Analysis

The first thing that must be remembered is that although Oestereich, Gutknecht, and Breen let an undetermined number of Resistance members off the hook for induction refusal, the decisions did not absolve them completely. Possession of both the Registration Certificate and the Notice of Classification remained duties required by the Selective Service Regulations, and willful failure to perform any duty required by the Regulations is punishable under §12 of the Act. While prosecutions for non-possession of a draft card are rare, they are not unknown. And although the Supreme Court has never ruled on the validity of the possession requirements per se, it is hard to imagine, in light of O'Brien, that turning in a draft card would be held to be legally protected conduct. All that Oestereich, Gutknecht, and Breen did was prohibit punishment other than criminal prosecution.

One thing which should not be underplayed in the punitive reclassification cases is the rather wide political gulf which separated the ACLU from the Resistance. The ACLU, for example, released a statement in February, 1968, a time when draft resistance was continuously in the news, strongly condemning civil disobedience as a tactic for social change, claiming that no civil liberties question was raised by persons who refused to register, and assuming the Selective Service law itself to be valid. It was not for another year that, after considerable debate, the ACLU reversed itself and opposed the draft. The Resistance, on the other hand, specifically chose the act

of returning draft cards because it was civil disobedience. Furthermore, vitually all public statements made by the Resistance regarded non-cooperation as giving up deferment as well as one's cards. Thus Local Board Memorandum No. 85 and the Regulations governing delinquency, far from being a hinderance, were precisely what the Resistance was asking for--the chance to face, and refuse, induction. Once this is realized there appears to be a degree of incongruity in the actions of those men who turned in their draft cards and then went to the ACLU to obtain injunctions against their local boards. Perhaps that is why only a small percentage of the young men who returned their cards agreed to serve as plaintiffs in the ACLU suits. And some of those who did join the civil actions evidently did so to postpone, not avoid, what they thought to be an inevitable confrontation. To the ACLU, however, punitive reclassification of those who turned in their cards was a suppression of symbolic free speech. The political divergence between the resisters and their lawyers can be seen in the fact that the Gutknecht decision, considered by the ACLU to be one of its most triumphant draft cases, was called merely "a limited victory for the draft resistance movement" by David Gutknecht himself.[26] What was brought into the courts was the politics of the ACLU, the personnel of the ACLU, and the tactics of the ACLU; the Resistance simply provided the litigants.

It is reasonable to assume that the Supreme Court granted pre-induction review in Oestereich only because such a move was supported by the Solicitor General. And perhaps Griswold asked that the Court hear the case out of fear that if James Oestereich were not returned to draft exempt status, the Justice Department would be faced with the unpleasant task of prosecuting literally dozens of divinity students and clergymen for induction refusal. But the Court, in heeding the Solicitor General's plea, opened the door for Breen, because there was little logic in distinguishing between a Congressional mandated exemption and a Congressionally mandated deferment (the only difference being that a deferment, but not an exemption, extends one's age of draft liability from twenty-six to thirty-five years of age). Things would have been a lot easier for the government had Hershey not been so adamant about applying the delinquency procedures to men otherwise classified 4-D.

Although Breen followed directly from Oestereich, Gutknecht did not. There would have been no inconsistency had the Court ruled the delinquency procedures to be valid when applied to a registrant not specifically exempted or deferred by statute. The 1967 Act even contained a passing mention of delinquents on which the Court could have relied. Furthermore, as Justice Stewart pointed out, there were several other grounds on which Gutknecht's conviction could have been struck down. For example, his induction order arrived only five days after his Delinquency Notice, thus not allowing him sufficient time to correct his transgression had he chosen to do so. So why didn't the Court follow a policy of judicial parsimony? Amicus curiae briefs from the Central Committee for Conscientious Objectors and the American Jewish Congress in no way indicated a groundswell of interest group pressure. A more subtle process was at work on the Court.

First of all, while the draft card burnings which followed the enactment of Public Law 89-152 involved at most a score of persons, the Resistance was launched with well over a thousand registrants disposing of their cards--a number which grew rapidly even after many of the original participants were declared delinquent. And while most of the Resistance was made up of students, it did include a substantial number of clergymen, school teachers, college professors, social workers, and other professionals. When the Delinquency Notices arrived, it was not only the "campus agitators" who faced reclassification, but also members of groups like the National Council of Churches and the American Federation of Teachers. Furthermore, unlike the draft card burners who had encountered tremendous public hostility a couple of years earlier, the men of the Resistance received considerable sympathy. Either turning in a draft card was perceived as less "violent" than burning one, or else non-cooperation became more widely tolerated as the Vietnam War continued. If anyone received the brunt of public hostility it was Hershey, especially after Local Board Memorandum No. 85 and his follow-up letter were published in the New York Times. So as "trial by Hershey" suddenly hit the predominantly white and middle class Resistance, the days of Selective Service's power to administer summary punishment were numbered.

The Court did act rather cautiously in throwing out the delinquency procedures. It could have granted certiorari in any one of several cases which came up before Gutknecht, but it declined to do so. The Justices probably wanted to dispose of Oestereich and the less thorny issue of applying the procedures to a divinity student before making a frontal assault. And when the Court finally did get to Gutknecht, it merely said that the Regulations governing delinquency were without statutory authorization. Congress was thus left with the option of overturning the Court's ruling by amending the Military Selective Service Act to provide for the reclassification and accelerated induction of those registrants properly judged delinquent. In any event, if draft card turn-ins somehow did become a threat to conscription, the Justice Department was left with the authority to initiate criminal prosecutions under §12 of the Act. The Supreme Court therefore did not endanger the war-making powers of the other branches of government, a precaution to which it has historically been sensitive.

Conclusion

Neither the Resistance with its campaign of non-cooperation, nor the ACLU with its argument of symbolic free speech, was fully successful in the punitive draft cases. The Supreme Court neither ended the Vietnam War--no one ever thought it would--nor extended the bounds of the First Amendment. Nevertheless, the Court must have given both groups a pleasant surprise by scrapping the delinquency procedures entirely. But, as any student of American politics should know, the Supreme Court, since its earliest days, caught in the cross-pressures of national controversies, has found ways of ruling in favor of a litigant without actually vindicating his political arguments. Oestereich, Gutknecht, and Breen were no exceptions.

FOOTNOTES

[1]393 U.S. 233 (1968).

[2]395 U.S. 295 (1970).

[3]396 U.S. 460 (1970).

[4]David Mitchell, "What Is Criminal?" in We Won't Go, ed. by Alice Lynd (Boston: Beacon Press, 1968), p. 98.

[5]372 F. 2nd 817 (2nd Cir. 1967).

[6]32 C.F.R. §1602.4.

[7]32 C.F.R. §§1617.1, 1623.5.

[8]32 C.F.R. Part 1642.

[9]32 C.F.R. §1642.12.

[10]412 F. 2nd 1103 (D.C. Cir. 1969).

[11]280 F. Supp. 78 (D. Wyo. 1968).

[12]390 F. 2nd 100 (10th Cir. 1968).

[13]283 F. Supp. 606 (S.D.N.Y. 1968).

[14]293 F. Supp. 772 (E.D.N.Y. 1968).

[15]Shiffman v. Selective Service Local Board No. 5, stay denied, 391 U.S. 930 (1968); Zigmond v. Selective Service Local Board No. 16, stay denied, 391 U.S. 930 (1968).

[16]391 U.S. 367 (1968).

[17]Wills v. United States, 384 F. 2nd 943 (9th Cir. 1967), cert. denied, 392 U.S. 908 (1968).

[18]406 F. 2nd 636 (2nd Cir. 1969).

[19]405 F. 2nd 494 (8th Cir. 1969).

[20]406 F. 2nd 631 (8th Cir. 1969).

[21]408 F. 2nd 622 (4th Cir. 1969).

[22]419 F. 2nd 762 (3rd Cir. 1969).

[23]421 F. 2nd 24 (3rd Cir. 1970).

[24]Kolden v. Selective Service Local Board No. 4, Kraus v. Selective Service Local Board No. 25, Anderson v. Hershey, Chaikin v. Selective Service Local Board No. 66, Faulkner v. Laird, Osher v. Selective Service Local Board No. 6, 397 U.S. 47 (1970).

[25]Troutman v. United States, Battiste v. United States, 397 U.S. 48 (1970).

[26]New York Times, January 20, 1970, p. 20.

THE FLAG AS A NON-VERBAL SYMBOL

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Americans daily are confronted by a plethora of non-verbal symbols, with the cross and the flag of the United States probably the most frequently visible. The flag, particularly, all Americans grow up with, if not through any deliberate effort on their part, then from its appearance in classrooms, at football games, and on television at sign-off time. It would therefore seem to be a benign symbol, one which resides comfortably in man's subconscious, to be stood up for, saluted, and displayed on Independence Day and other ceremonial occasions. However, a reading of court decisions, attendance at school board meetings, or even participation in some dinner table conversations illustrates that this symbol no longer enjoys a placid position in the collective mind of America. Some Americans, for a variety of reasons, have ceased to consider or display it in a respectful (i.e., traditional) manner, and instead are burning it, redesigning it, or sporting it on their britches. While it might be interesting to speculate on their reasons for so doing, it is perhaps more important to attempt an explanation of the strong, sometimes violent reactions of other Americans to the actions of the flag burners and wearers, who are, at best or at worst, manipulating a non-verbal symbol.

An analysis of the flag as a specific non-verbal symbol becomes especially meaningful when viewed in the context of the generalized definition of a symbol. Arnold Whittick in the book, Signs, Symbols, and Their Meaning, approaches a definition of "symbol" in terms of its origin. "The Greek word from which the term symbol is derived, appears to have meant a bringing together; and this meaning is the logical antecedent of the modern meaning, for symbolism is a bringing together of ideas and objects, one of which expresses the other."[1] Alfred Whitehead both concurs in and elaborates upon this definition by noting "a symbol gathers emotional significance from its emotional history in the past; and this is transferred . . . to its meaning in present use."[2] A brief but accurate capsulizing definition is presented in The Languages of Communication, which proposes that "symbols can be defined as signs that are freely created, representing some content, and are transmitted by tradition."[3] The analysis following is predicated upon these complementary definitions and their implicit containment of conscious symbols only, such as those which represent governmental, religious, or other social institutions.

Why or how has society as a whole become so concerned with the flag as such a non-verbal symbol? In exploring their less than noble motivations first, John Dewey's observation proves helpful: "Non-verbal symbols give the conceit of learning and coat the mind with a varnish waterproof to new ideas."[4] Could it not be that the

the "average" American, in finding the flag "as comfortable as an old shoe" to live with, has avoided thinking about what it has meant, does mean, and should mean in the future? If such is the case, then any but the most standard view of the flag would seem appalling, since the "average" American's intellectual growth has been stunted in relation to the possibilities of the flag's symbolism. Most disturbing here, however, is the willingness of some Americans to challenge the admittedly atypical behavior of others with an arrogrance unfounded in knowledge. Shakespeare put it well:

> . . . man, proud man,
> Direct in a little brief authority,
> Most ignorant of what he's most assur'd
> His glassy essence, like an angry eye,
> Plays such fantastic tricks before high heaven
> To make the angels weep.[5]

There is certainly no basis for assuming that all or even most Americans who resent flag desecrators do so on an arrogant, intellectually unfounded, "how dare you" basis. But a statement by Alfred North Whitehead can lead to another possible explanation for their objections. As he says, "it seems as though mankind must always be masquerading."[6] With reference to flag "supporters," this could be taken to mean they have always seemed to be patriotic by waving or displaying the flag on appropriate occasions, and they equate these actions with total patriotism or the only real patriotism which the flag could symbolize. It is conceivable that they, through preoccupation or laziness, have been content with such "gut level" but routine reactions to the flag. This would then put them in a state of surprise, if not shock at the actions of those who "do something" with the flag, since such people have obviously, consciously thought about the flag and determined a course of action with respect to it.

A third motivation and possible justification for the behavior of flag "supporters" involves the issue of how desirable it is for people to rely on non-verbal symbols for the sake of "convenience." That they do is postulated in The Languages of Communication, where it is written that symbols "are psychologically--but not necessarily logically--more convenient for most people to handle conceptually than whatever they stood for." Or, they make possible "a type of conviction or thought or feeling which would otherwise be impossible to generate."[7] On the one hand, someone like Kenneth Burke would see this as a reasonable attitude toward a non-verbal symbol. In his book, Counterstatement, he discusses how a symbol appeals "as the interpretation of a situation. It can by its function . . . give simplicity and order to an otherwise unclarified complexity."[8]

Contrarily, Stuart Chase suggests that people distort their view of the universe by excessive reliance on a non-verbal symbol or symbols, for the sake of convenience:

> Let us glance at some of the queer creatures created by personifying abstractions in America. Here in the center is a vast figure called the Nation--majestic and wrapped in the Flag. When it sternly raises an arm, we are ready to die for it. Close behind rears a sinister shape, the Government. Following it is one even more sinister, Bureaucracy. Both are festooned with the writhing serpents of Red Tape. High in the heavens is the Constitution, a kind of Chalice like the Holy Grail, suffused with ethereal light.[9]

Therefore, depending on how one wants to view the convenience issue, he can be sympathetic toward, or contemptuous of the negative reaction of surprise of flag "supporters" toward flag "distorters," because it has not been convenient for them (the "supporters") to discover the complexity of the flag symbol prior to its becoming a public issue.

The next explanation of the behavior of flag "supporters" tends to defend their actions. Consider Whitehead's statement: ". . . the transition from a colored shape to the notion of an object which can be used for all sorts of purposes which have nothing to do with color, seems to be a very natural one; and we--men and puppy dogs--require careful training to refrain from acting upon it."[10] What Whitehead appears to be saying is that we learn, from infancy, to equate a particular object with its verbal equivalent (the abstraction of the object). If this is the way people learn to learn, then perhaps it is understandable that they experience some tunnel vision when faced with conflicting meanings for a particular object, (in this case, the flag), especially since it, too, is presented by parents and teachers as having a particular meaning, even though it is a non-verbal symbol.

A fifth and final explanation for the behavior of flag "supporters" has the most serious implications, and it offers the most valid rationale for sympathizing with them. It involves their view of themselves as Americans and human beings. Consider this premise, set forth by Aldous Huxley: "We protect our minds from the reality we do not wish to know too clearly."[11] Assuming the truth of this premise, think about the "reality" many Americans inhabit. Apparently it is not a happy one. Arnheim suggests that "in our society the handling of ornament (ornamental design) betrays the decay and confusion of values. Some things are assigned values they do not have. The inherent values of others is no longer understood, and therefore, inappropriate values are attached to them."[12] Reality, so far, then, is a confusing state for many Americans. According to Suzanne Langer, it is also a threatening one, in terms of their mental security. Men have routine jobs to which they can attach no symbolic importance. They move constantly, many having no home that is a symbol of their childhood, thus

> cutting another anchor line of the human mind. Many no longer know the language that was their mother tongue. . . . old symbols are gone,[13] /and/ human life in our age is so changed and diversified that people cannot share a few historic "charged" symbols that have about the same wealth of meaning for everybody. . . . The new forms of our new order have not yet acquired that rich historic accretion of meanings that make many familiar things "charged" symbols to which we seem to respond instinctively.[14]

And, as Miss Langer sees it, reality "that does not incorporate some degree of ritual has no mental anchorage. . . . Therefore, interference with /symbols/ that have ritual value is always felt as the most intolerable injury one man can do to another . . . arous/ing/ the most fantastic bursts of chauvinism and self-righteousness."[15]

If the reality which is the present has been accurately described, if it involves the uncertainties and rootlessness suggested, perhaps it is surprising that more anger has not erupted when some Americans use one of the few remaining "old symbols" in different, seemingly revolutionary ways reflective of some new order.

In terms of their effects upon society, neither the flag "distorters" nor the flag "supporters," whatever their motivations, should be considered dangerous. It is the larger institutions of society which pose a greater threat to them through their structuring of meanings for non-verbal symbols. Television and the schools, for instance, generally purvey one attitude as to what is true, good, beautiful, democratic, or "the American way" of doing things or viewing the world. It should not be surprising that human beings growing up under such indoctrination should either be lulled by it or turned into skeptics. Perhaps if patriotism had not so long been defined by society's institutions as "my country, right or wrong," the flag still would be a viable non-verbal symbol for all Americans. But since the proverbial damage has been done, it is the "average" American, the one who still is not a flag "distorter," who will have to adjust to a "new order" of symbols or much more varied interpretations of the old. Alfred Whitehead puts it directly and well: "The successful adaptation of old symbols to changes of social structure is the final mark of wisdom in sociological statesmanship . . . ." He adds: "Those societies which cannot combine reverence to their symbols with freedom of revision, must ultimately decay, either from anarchy, or from the slow atrophy of a life stifled by useless shadows."[16]

FOOTNOTES

[1]Arnold Whittick, Symbols, Signs, and Their Meaning (London: Leonard Hill Books, Limited, 1950), p. 4.

[2]Alfred Whitehead, Symbolism, Its Meaning and Effect (London: Cambridge University Press, 1928), p. 99.

[3]Ludwig von Bertalanffy, "The Tree of Knowledge," quoted in George N. Gordon, The Languages of Communication (New York: Hastings House Publishers, 1969), p. 61.

[4]John Dewey, How We Think, quoted in Harold E. Briggs, Language . . . Man . . . Society (New York: Rinehart and Company, 1949), p. 59.

[5]William Shakespeare, quoted in Gordon, p. 72.

[6]Whitehead, p. 74.

[7]Gordon, pp. 63-64.

[8]Kenneth Burke, Counterstatement (Los Altos, California: Hermes Publications, 1931), p. 154.

[9]Stuart Chase, Tyranny of Words, quoted in Briggs, p. 387.

[10]Whitehead, p. 4.

[11]Aldous Huxley, The Olive Tree, quoted in Briggs, p. 107.

[12]Rudolph Arnheim, Art and Visual Perception, quoted in Gordon, p. 71.

[13]Suzanne Langer, Philosophy in a New Key (Cambridge, Massachusetts: Harvard University Press, 1963), p. 292.

[14]Ibid., pp. 287-88.

[15]Ibid., pp. 290 and 292.

[16]Whitehead, pp. 61 and 104.

SYMBOLIC SPEECH: A CONSTITUTIONAL ORPHAN

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The Constitution is the infrastructure of our government. The Bill of Rights is, in essence, a series of prohibitions imposed upon our government which preserves and creates certain freedoms. That which the Bill of Rights does not protect is an orphaned right which must fend for itself as best it can in the real world. Symbolic speech--or, more accurately, non-verbal communicative conduct--has been to date such a right. The legitimacy of its orphanage is the subject of this article.

I

In early 1967, Stephan Radich, a New York art dealer, was arrested and charged with desecrating the flag. Prior to his arrest he had been displaying in his gallery sculptures constructed primarily of United States flags. In one of the sculptures a furled flag represented an erect penis on a human body, and in a second figure the flag was stuffed and shaped as a human body hanging from a noose. Mr. Radich considered these sculptures to be protests against the Viet Nam war.

On April 26, 1968, Paul Cohen was arrested in the Los Angeles County Courthouse and charged with disturbing the peace. He had been observed in the corridor of the courthouse wearing a jacket bearing the plainly visible words: "Fuck the Draft." Mr. Cohen subsequently testified that he wore the jacket in order to inform the public of the depths of his feelings against the Viet Nam war and the draft.

On February 19, 1971, attorneys for both Radich and Cohen, who in the interim had been found guilty, appeared before the U. S. Supreme Court to argue that the First Amendment compelled reversal of their clients' convictions. On March 24, 1971, the conviction of Stephan Radich was affirmed;[1] on June 7, 1971, the conviction of Paul Cohen was reversed.[2]

These two cases highlight one of the thorniest areas of constitutional litigation, namely, the relationship between the First Amendment and symbolic speech. Since 1965 when the Supreme Court first introduced the phrase "pure speech,"[3] which was to be distinguished from the communication of ideas by "conduct," court after court has unsuccessfully groped to discern the meaning of that distinction. The result has been a constitutional briar patch of inconsistent decisions and doctrines.

It is this writer's opinion that all symbolic speech which is primarily intended to be communicative should be given full First Amendment protection.[4] This opinion is based upon the following considerations:

(1) The unmanageability of the present approach to symbolic speech; and

(2) An analysis of the First Amendment in terms of its rationale and in terms of contemporary communications theory.

II

The arbitrariness of the distinction between "pure speech" and "symbolic speech" is demonstrated by the treatment of Messers Radich and Cohen at the hands of the U. S. Supreme Court. Mr. Radich is now a criminal solely because he chose to protest non-verbally. But his message was the same as Cohen's.

The unmanageability of the distinction has been further illustrated in a variety of circumstances by a variety of courts. The U. S. Supreme Court, for example, has reversed the criminal convictions of persons whose "crime" had been that of conducting a silent "sit-in" at a segregated library, stating that the Freedom of Speech is "not confined to verbal expression" but covers "appropriate" types of action as well.[5] Three years later, however, the Court did not feel that burning a draft card was "appropriate" enough.[6] The year after that, wearing a black arm band was held to be conduct "closely akin to 'pure speech.'"[7]

Lower courts have been similarly troubled. Some courts have upheld public school hair length regulations when challenged as violating the First Amendment,[8] while others have struck the regulations down when confronted with identical arguments![9] Courts have held that dragging and stepping on a Soviet flag is constitutionally protected communication,[10] while wearing a vest made out of a U. S. flag is not.[11] That topless dancing is protected communication;[12] that it is not.[13].

In short, the present approach to symbolic speech characterized by an attempt to distinguish "pure speech" from communication of ideas by "conduct," leads to apparent inconsistencies and to a disparity of results. When such a situation develops in any area of the law it becomes apparent that the legal doctrine involved has become too unwieldy. As a result, the populace is deprived of the primary benefit of the rule of law, to wit: a confidence in what conduct is illegal. Furthermore, repeated inconsistencies breed disrespect for the law. Hence, the unmanageability of the present approach argues for a new method of harmonizing symbolic speech and the First Amendment.

If the rationale underlying the freedom of speech clause in the First Amendment is examined in terms of contemporary communications theory, a compelling case can be made for bringing symbolic speech within the protection of that Amendment. Although no single rationale has been forwarded which all commentators agree upon as the raison d'etre of the First Amendment,[14] the so-called "Truth-Seeking Model" is most often referred to as the basic justification of the Free Speech clause of the First Amendment. It is this writer's opinion that:

(a The Truth-Seeking Model should not be considered the sole rationale of the First Amendment; and

(b) Even if sole reliance were placed upon the Truth-Seeking Model, contemporary communication theory compels the conclusion that non-verbal communicative conduct be protected by the First Amendment.

Justice Holmes, in one of his historic dissents, argued that the First Amendment was a device designed to permit a laissez-faire system of concept competition to operate: "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market. . . . That at any rate is the theory of [the Free Speech clause] of our Constitution."[15]

The Truth-Seeking Model of the First Amendment postulates that the framers of the Bill of Rights had such a market place of ideas in mind when the First Amendment was written, and that it was their intention to insure that truth would emerge from this marketplace. The Supreme Court still accepts this theory as at least a partial explanation of the First Amendment's purpose. The court recently stated: "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail. . . ."[16]

The pursuit of truth, argue the "marketplacists," is furthered only by the process of rational discourse.[17] To insure that all rational arguments are heard, they argue, it is necessary to guarantee the availability of that media most conducive to presenting such arguments, that is, the media of verbal and written communication.

By adopting this model of the First Amendment and by classifying non-verbal communicative conduct as basically trivial and emotional discourse, courts are able to argue that the First Amendment affords no protection to the conduct in question. For example, in arguing that there is no First Amendment protection for wearers of long hair, a court recently stated: [The First Amendment] only protects expressions of ideas and points of view which make a significant contribution to the marketplace of ideas."[18] The court concluded that wearing long hair makes no such "significant contribution."

It would be unwise, however, to adopt the Truth-Seeking Model as the sole rationale of the First Amendment. This becomes apparent when one examines the assumptions upon which this model is based. The Model presupposes, first, that there is an objective truth, which is ascertainable by man under the proper conditions. Such an attitude fits nicely with the rationalism of the Enlightenment and its philosophical descendents, but is vulnerable to twentieth century skepticism. If one holds that objective truth is unascertainable, adoption of the Truth-Seeking Model as the rationale for the First Amendment becomes a meaningless gesture.

The Model also assumes that man can discover the truth by rational mental processes and that man is rational. The Model discards the possibility that truth is discernable via basically emotional--or irrational--methods. Hence, a distinction is made by those who adhere to the Truth-Seeking Model between discourse which itself is rational and discourse considered to be emotional (which nonetheless adds fuel to rational debate). So, for example, a speech which presented the case for withdrawal from Viet Nam would be protected by the First Amendment, but wearing a black arm band in order to show the degree of one's commitment to a point of view based on rational thought would not receive First Amendment protection. This distinction was a focal point of disagreement in the High Court's reversal of Paul Cohen's conviction, discussed at the outset. In defending Cohen's right to wear a jacket with "Fuck the Draft" scrawled on it the Court, per Justice Harlan, stated: "We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for that emotive function which practically speaking, may often be the more important element of the overall message sought to be communicated."[19]

Justice Blackmun, writing for the dissenters, could only latch onto the "pure speech"-conduct distinction: "Cohen's absurd and immature antic, in my view, was mainly conduct and little speech."[20]

If one contends, therefore that the pursuit of truth is aided by the communication of emotional statements--which the Supreme Court has apparently done--then even the Truth-Seeking Model would provide protection to many forms of non-verbal communication. In sum, the weaknesses of the assumptions underpinning the Truth-Seeking Model are, of themselves, reasons why this model should not be relied upon as the First Amendment's sole rationale.

Additionally, the whole idea of interpreting the First Amendment in terms of an economic model has come under attack. Jerome Barron, Professor of Law at George Washington University, has argued that: "As a constitutional theory for the communication of ideas, laissez-faire is manifestly irrelevant."[21] He feels that the Truth-Seeking Model is a "hopeless anachronism" because it is a product of "liberal free market economics of the nineteenth century" made obsolete by modern technology.[22]

Finally, even if the assumptions of the Truth-Seeking Model are accepted as valid, it would be unwise to place sole reliance upon this model. Such reliance could lead to the conclusion that much of what we think of as art and humor would be unregulable. The irrational could be forbidden, and that which has been proven untrue could not be discussed. Such a result, although perhaps not likely, should be vigorously avoided. For these reasons, therefore, it would seem unwise to consider the Truth-Seeking Model the sole rationale for protecting the Freedom of Speech.

But even if one were to place sole reliance upon the Truth-Seeking Model, in applying contemporary communication theory to the Model it seems clear that non-verbal communicative conduct should be protected by the First Amendment. Recall the argument used by the "Marketplacists" to justify curtailing non-verbal communication. They argue that since only rational discourse is intended to receive First Amendment protection, and since non-verbal communicative conduct is not a form of rational discourse, such conduct is not within the sweep of the First Amendment and hence can be curtailed. However, if it could be proven that communication via symbols (i.e., arm bands, ritualistic burnings, etc.) <u>is</u> a form of rational discourse, their argument loses most of its thrust.

Karl H. Pribram, a psychologist who studies the working of the human brain, has said: "Man . . . uses symbols significantly. This he does when he reasons. He takes a context-dependent symbol and for the duration of a particular purpose assigns to it a context-free meaning."[23]

Furthermore, he argues the use of symbols in communication is a shortcut from the mind of one human to another.[24] Symbols, therefore, can be seen as a primary vehicle of rational meaning. Theodore Thass-Thieneman, a specialist in psychology and linquistics, has stated that "the symbol addresses man who wants to see, observe, contemplate, and asks not for the cause but for the meaning of the phenomenon. The symbol is the tool of thinking."[25]

Furthermore, communication via symbols can be seen to have advantages over oral communication. It has been theorized that non-verbal communication "allows concise and <u>economic phrasing,</u>" is of "prime importance in situations <u>where words fail completely,</u>" and is often less prone to "<u>distortions of signification</u>" than is verbal communication.[26]

That non-verbal conduct can be highly communicative seems intuitively certain. And at times, such communication can be extremely "rational" and deserving of First Amendment protection under the Truth-Seeking Model. Justice Harlan noted such a situation in a civil-rights sit-in case, and argued in a separate concurrence:

> Such a demonstration in the circumstances of these . . . cases, is as much a part of the "free trade of ideas" . . . as is verbal expression. . . . It, like speech, appeals to good sense and "to the power of reason as applied through public discussion," . . . just as much as, if not more than, a public oration delivered from a soapbox at a street corner.[27]

Another perspective on this problem is presented by Marshall McLuhan. It is his thesis that the medium <u>is</u> the message.[28] The impact of this concept upon the meaning of the First Amendment could be significant. When Stephan Radich's case[29] was before the New York Supreme Court, Judge Fuld voted for reversing his conviction. He argued:

> /T/he State may not act to suppress symbolic speech or conduct having a clearly communicative aspect, no matter how obnoxious it may be . . . . In our modern age, the medium is very often the message, and the State may not legitimately punish that which would be constitutionally protected if spoken or drawn, simply because the idea has been expressed, instead, through the medium of sculpture.[30]

Regardless of the validity of McLuhan's thesis, he remorselessly points out that our culture is no longer dependent on basically verbal modes of communication, and hence all of our preconceptions relating to communication must be thoroughly re-examined.

The words employed in the First Amendment were the words of a different America. No radio, television, or telephone connected the white, male, property holding electorate of the Thirteen States. This prohibition as ratified in 1791 precluded the National State from closing off the information channels customarily used to facilitate the communication of worthwhile ideas.

Today, however, the basic media of information transmission are television and radio. This is clearly reflected, for example, by the fact that politicians campaigning for national and local office now concentrate their resources into buying radio and television time.[31] The "marketplace of ideas" no longer exists on the street corners and in the Hyde Parks of America, but in the television and radio studios of the major networks. The problem for any would-be communicator is to find access into this marketplace.

In a recent article, a graduate student of Rhetoric and Communication and an Associate Professor of Speech at Kent State University examined the problems of non-verbal communicative conduct, and concluded:

> Could it be that the flag burner is more alert to a rhetoric which will be heard than are those of us who talk so frequently about free speech. The flag burner is obviously saying that actions speak louder than words, that words are not often heard, and that this is one of the few ways the ordinary citizen can attract the mass media.[32] /Emphasis added./

The argument suggested by Goodman and Gordon has never been accepted in a court as a justification for extending the reach of the First Amendment, although the argument has been made.[33] However, an analysis of what the Framers of the First Amendment actually accomplished in terms of their technology, and an attempt to reconcile the Amendment with twentieth century technology, could lead to acceptance of the access argument--and simultaneously to a broadening of the First Amendment.

IV

As has been previously suggested, no single rationale has been universally accepted as the basis of the First Amendment. In addition to the Truth-Seeking Model, a "Preservation of Democracy Model," a "Safety-Valve Model," and a "Personal Freedom Model" have been forwarded. Under any of these alternative models non-verbal communication would seem to legitimately deserve full First Amendment protection.

If sole reliance is placed upon the Truth-Seeking Model, an argument can be made for denying non-verbal communicative conduct the protections of the First Amendment, although such an argument has some major weaknesses. It is much more difficult to make any case at all for denying non-verbal communicative conduct First Amendment protection if any of the other three models are employed.

For example, the Preservation of Democracy Model hypothesizes that the First Amendment serves to insure the existence of an informed electorate.[34] This is assumed to be necessary for our republican form of government to successfully function. Under such a model, all forms of political communication deserve protection, whether the communication be in the form of a campaign speech, a political advertisement,[35] or a political demonstration designed to dramatize an issue. Non-verbal communicative conduct, at least that which has political overtones (i.e. flag burning, draft card burning, etc.), cannot be read out of the First Amendment when this model is employed.

The Safety-Valve Model suggests that a society that can freely express itself will be less prone to violence, and hence healthier. As one scholar has succinctly stated: "In short, suppression of opposition may well mean that when change is finally forced on the community it will come in more violent and radical form."[36]

The Safety-Valve rationale does not encourage distinguishing between verbal and non-verbal methods of communicating. For example, if it is true that by permitting disaffected members of our society to speak out we decrease the likelihood that their frustrations will be vented by violence, it would seem to be no less true that the same purpose will be served if we permit such persons to vent by burning a flag.

Finally, the Personal Freedom Model would justify the Freedom of Speech on individual psychological grounds. The freedom to express oneself is thought of as a basic human need which warrants governmental protection. Justice Douglas has recently commented that the "First Amendment was designed so as to permit a flowering of man and his idiosyncrasies."[37] If government suppresses expression it is "the greatest displeasure and indignity to a free and knowing spirit that can be put upon him."[38]

Under the Personal Freedom Model it is also rationally impossible to exclude non-verbal communication from the protection of the First Amendment. Who can doubt that the arm band-wearer is satisfying himself as much as the public orator?

Only the Truth-Seeking Model, of those Models thus far suggested as a rationale of the First Amendment, can possibly imbue the First Amendment with characteristics which logically permit a constitutional distinction to be made between verbal and non-verbal communication. If one accepts the argument, which was made above, that the Truth-Seeking Model should not be considered the sole rationale of the First Amendment, and if one accepts any (or all!) of the alternative models, then a valid case can be made for protecting non-verbal communication.

V

As has been suggested previously, it is this writer's view that conduct which is primarily communicative in nature, whether verbal or non-verbal, should receive an equal degree of First Amendment protection. The adoption of this approach would require courts to recognize that the core value of the First Amendment is communication, not speech.

Valid arguments, to be sure, can be raised against this proposal. But adoption of the approach argued for above would surely reduce the inconsistencies which abound in this area of constitutional law, and would be more in line with the thought and tenor of our time.

FOOTNOTES

[1]People v. Radich, 401 U.S. 531 (1971), aff'd. by an equally divided court, 26 N.Y. 2d 114 (1970).

[2]Cohen v. California, 403 U.S. 15 (1971).

[3]Cox v. Louisiana, 379 U.S. 536, 555 (1965).

[4]This does not mean that non-verbal communicative conduct will be permitted in all circumstances, but that it will be subject to the same limitations that are imposed on "verbal speech." For example, one cannot falsely shout "Fire!" in a crowded theater, Schenck v. US, 249 U.S. 47, 52 (1919), nor may one use "fighting words" on a street corner, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), for a showing of great danger to many persons in these instances overcomes the protection afforded speech. Distinguishing between "communicative conduct" and "non-communicative conduct" for First Amendment purposes, however, is a delicate task. For an in depth examination of the problem see Note, "Symbolic Conduct," 68 Colum. L. Rev. 1091, 1091-1092, 1109-1117 (1969).

[5]Brown v. Louisiana, 383 U.S. 131, 132 (1965).

[6]US v. O'Brien, 391 U.S. 367 (1968).

[7]Tinker v. Des Moines Indep. Comn. Sch. Dist., 393 U.S. 503, 505 (1969).

[8]See, for example, Crews v. Cloncs, 303 F.Supp. 1370 (D.C. Ind. 1969); Freeman v. Flake, 320 F.Supp. 531 (D. Utah 1970).

[9]See, for example, Richards v. Thurston, 304 F.Supp. 449 (D. Mass. 1969), aff'd 424 F.2d 1281 (1st Cir. 1970); Finot v. Pasadena City Board of Education, 250 C.A. 2d 189 (1967).

[10]Allen v. District of Columbia, 187 A.2d 888 (D.C. Ct. of Appeals 1963).

[11]People v. Cowgill, 274 C.A.2d 923, appeal dismissed, 396 U.S. 371 (1970).

[12]In Re Giannini, 69 Cal.2d 563 (1968), cert. denied, 395 U.S. 910 (1969).

[13]City of Portland v. Derrington, 253 Or. 289 (1969), cert. denied, 396 U.S. 901 (1969).

[14]See discussion in section IV of this essay.

[15]Abrams v. United States, 250 U.S. 616, 630 (1919).

[16]Red Lion Broadcasting Co., v. F.C.C., 395 U.S. 367 390 (1969).

[17]See generally, Peter Brett, "Free Speech Supreme Court Style: A View from Overseas," 46 Tex. L. Rev. 668, 669 ff. (1968).

[18]Brick v. Denver Board of Education, 305 F.Supp. 1316, 1320 (D.Colo. 1969).

[19]Cohen v. California, supra at 26.

[20]Id., at 27.

[21]Jerome Barron, "Access to the Press--A New First Amendment Right," 80 Harv. L. Rev. 1641, 1656 (1967).

[22]Jerome Barron, "Access--The Only Choice for the Media?" 48 Tex. L. Rev. 766, 782 (1970).

[23]"What Makes Man Human," James Arthur Lecture on the Evolution of the Human Brain, The American Museum of Natural History, New York, 1970, page 29.

[24]Karl H. Pribram, interview of Nov. 19, 1970, Stanford, California.

[25]Theodore Thass-Thienemann, Symbolic Behavior (New York: Washington Square Press, 1968), page 22.

[26]Ruesch, Jurgen, and Weldon Kees, Non-verbal Communication (Berkeley: University of California Press, 1956), pages 190-193.

[27]Garner v. Louisiana, 368 U.S. 157, 201 (1961).

[28]Marshall McLuhan, Understanding Media (New York: McGraw Hill, 1964). For example, he contends that clothing is a "non-verbal manifesto of political upset" (Id., at 121), that movies are a non-verbal form of experience, "a form of statement without syntax" (Id., at 285), etc.

[29]See first page of this essay.

[30]People v. Radich, 26 N.Y.2nd 114, 127 (1970).

[31]See generally, Joe McGinnis, The Selling of the President--1968 (New York: Pocket Books, 1969).

[32]Goodman, Richard J. and William I. Gordon, "The Rhetoric of the Flag," 1969 Yearbook of the Committee on Freedom of Speech of the Speech Association of America, 33, 40.

[33]See, for example, U.S. v. Ferguson, 302 F.Supp. 1111, 1114 (N.D.Cal. 1969).

[34]See generally, Alexander Meikeljohn, Political Freedom (New York: Harper & Row, 1960).

[35]See New York Times v. Sullivan, 376 U.S. 254 (1964), where an allegedly libelous advertisement was found within the protection of the First Amendment because it concerned a public figure. The Court spoke of "a national awareness of the central meaning of the First Amendment. . . ." Id., at 273. This reference suggests that the Supreme Court accepts the Preservation Model, at least in part, as a well-spring of the First Amendment. See also, Red Lion Broadcasting Co., supra at 390.

[36]Thomas I. Emerson, "Toward a General Theory of the First Amendment," 72 Yale L. Journal 877, 885 (1963).

[37]William O. Douglas, Points of Rebellion (New York: Random House, 1969), p. 11.

[38]Milton, Aeropagitica 21 (Everyman's Library ed. 1927) /referring to licensing of the press/.

THE SUPREME COURT AND THE FIRST AMENDMENT: THE 1970 TERM

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When the United States Supreme Court recessed in June, 1970, many cases involving freedom of expression remained on the docket. The absence of a ninth Justice for much of the year forced the postponement of many thorny issues of constitutional law. During the Term that followed, all these cases would be argued and decided. But the case for which the 1970-71 Term will be known--very likely the most significant First Amendment case in several decades--was not even a gleam in a lawyer's eye when the Court adjourned for the summer. The cause celebre was, of course, the battle over the right of newspapers to publish excerpts from the purloined Pentagon Papers. The central issue of the case--governmental power to enjoin publications allegedly injurious to the national interest--has been infrequently litigated. Now, at the close of an already eventful Term, the Court would be called upon to consider the most basic issues of First Amendment policy and determine the scope of freedom of the press. The importance of the Pentagon Papers case could hardly be exaggerated. Yet amid the public furor, there is a risk of losing sight of other significant decisions during the same Term. Accordingly the present review seeks to place this controversy in the context of a series of decisions during the Term which it climaxed so spectacularly.

I. Prior Restraint, The Press and the Pentagon Papers

The Justices were about ready to wrap matters up for the year when, on June 13, the New York Times startled the nation with the first of a series of articles based upon a hitherto secret chronicle of the Vietnam War. During the days that followed, events moved with incredible speed--showing that the courts can act with dispatch when necessary. On Monday the Justice Department went to the district court in New York, seeking an injunction against further installments of the Times series. The judge granted temporary relief, so that he might consider the merits of the case, and publication temporarily ceased. When the judge concluded, several days later, that the Government had not made a sufficient showing of irreparable harm to warrant an injunction, the Court of Appeals extended the stay. Meanwhile a similar case arose in the District of Columbia when the Washington Post began to publish other stories based on the Pentagon Papers. There too a District Judge held the Government had failed to make a case justifying injunctive relief.

The two courts of appeals--one in New York and the other in Washington--handed down conflicting decisions on Wednesday, June 23, apparently leaving the

Post free to publish the very material that the Times could not print. The next day both cases were brought before the Supreme Court. Oral argument was scheduled for 11:00 on Saturday morning, the 26th. The record in one case reached the Court Friday shortly after noon, while the other record did not arrive at the clerk's office until evening. Remarkably, the Court was well prepared for the argument the following morning.

The several hours of intense oral argument--a Yale Law School professor on one side, a former Harvard Law School Dean on the other--revealed deep divisions within the Court. A split decision was almost inevitable: The question remained, however, which way the split would run, for the views of several Justices remained unclear. The following Wednesday the suspense was broken. The Court convened, with only a single item remaining on its docket. The judgment of a majority was announced "per curiam"--an unsigned opinion for the Court--by the Chief Justice, who in fact later filed a dissent. Before the case was closed every Justice had given his views separately--a proliferation of individual opinions caused, said the Chief Justice several days later in a television interview, by the haste and pressure of the case.

The opinion of the Court comprised a single, simple paragraph.[1] Citing earlier decisions for the view that any prior restraint is highly suspect, and that a government seeking to impose it bears a heavy burden, the opinion held simply that the Justice Department had failed to meet the burden in this case.

The meat of the decision lay, of course, in the separate opinions. The Justices were arrayed along a broad spectrum, from the absolutist position of Justice Black to the security-conscious deference of Justice Harlan. For Justice Black, the answer was easy; the Framers had long ago resolved the question of prior restraint in the very terms of the First Amendment--a concept that admitted of no exceptions. Justice Douglas, who joined him, placed additional emphasis on the absence of any legislative authority for the Government's action. (The Justice Department had relied mainly on two federal statutes which made it a crime to disseminate certain strategic information which these laws defined. The Court was divided on the applicability of those laws, which were not directly involved in the case. Douglas maintained that Congress had been faithful to his view of the First Amendment by declining to permit restraints on the press under such conditions.)

Justice Brennan, who also concurred specially, stressed what he felt to be the inappropriateness of even a temporary decree against publication. But he went on to acknowledge "an extremely narrow class of cases in which the First Amendment's ban on prior restraint may be overriden." He continued, by way of illustration: "only governmental allegation and proof that the publication must inevitably, directly and immediately cause the occurrence of an event kindred to imperiling the safety of a transport ship already at sea can support even the issuance of an interim restraining order." Clearly, in Brennan's view, the government had made out no such case against either the Times or the Post.

Justices Stewart and White also concurred, but on much narrower grounds. Stewart shared some of the concerns of both groups of his colleagues on the merits of the case, but found it unnecessary to go as far as either. For him the essential issue was one of separation of powers: Classification and protection of confidential and secret documents was mainly a prerogative of the Executive branch, and not of the courts. It was therefore inappropriate to implicate the judiciary as the Justice Department had sought to do in the present case. Had Congress expressly authorized proceedings of this sort to protect secrecy or confidentiality, then the court would have to determine the constitutionality of such a law. But in the absence of Congressional action, or a clear showing of irreparable injury, the courts should keep out.

Justice White also agreed that the government had failed to meet the extraordinarily high burden facing anyone who seeks to restrain the press. Moreover, the very secrecy of the material in issue--which remained locked in the Court's vaults--argued against banning its dissemination, since such a judgment would offer little guidance to other courts. But Justice White went on to suggest that publishers who could not be enjoined before publication probably could be prosecuted after the fact. For him, the protection of the First Amendment in such cases was essentially a guarantee that the public would see the material and could judge for itself, not that the publisher would enjoy a complete immunity. Almost gratuitously, White added that if the publishers of the Times and Post were later prosecuted, he "would have no difficulty in sustaining convictions" under relevant sections of the espionage act.

Justice Marshall, the last of the concurring members, shared Justice Stewart's view that the issue was primarily one of separation of powers. He felt, however, that the branch entitled to greatest deference in such matters was the Congress and not the President. The case became relatively easy for him because Congress had once considered, and rejected, a law which would have enabled the President to go to court against newspapers under essentially these conditions. Marshall differed with White on the amenability of the papers to subsequent punishment. But even if criminal sanctions were available, that fact hardly helped the Government's case in advance of publication. Indeed, if anything, the possibility of subsequent punishment would weaken the claim of irreparable injury prior to publication.

The oral argument left observers fairly certain that Chief Justice Burger and Justice Blackmun would dissent, as they did, joined by Justice Harlan. The Chief Justice was not ready to say that a permanent injunction was justified. The case had been rushed through the courts, much too fast to make an informed judgment either way. The appropriate dispositions would be the one ordered by the Court of Appeals in New York--to send the case back to the district judge for further proceedings. Since even the lawyers for both sides had shown unfamiliarity with the documents during oral argument, a remand was essential to permit calmer consideration of the case.

Justice Harlan developed the same theme at somewhat greater length, after reviewing the "frenzied train of events" that had brought the cases before the Court. Given the importance of the case, the haste was unseemly and injudicious. Reaching the merits under duress, he dissented from the Court's dispostion largely by reason of deference to the President in matters of foreign relations. The Justice Department had argued the United States would be seriously embarrassed in the conduct of, for example, the Paris peace negotiations over Vietnam. While the President's position might ultimately be overruled, that should be done only with the greatest care and after ample study.

Justice Blackmun, the newest member of the Court, concentrated on what he felt the unseemly conduct of both newspapers--taking their own time towrite stories based on purloined documents, and then forcing both the Government and the Court to act with haste once the issue was out in the open. The First Amendment, he insisted, was not absolute. Such a case called for a careful "weighing, upon properly developed standards, of the broad right of the press to print and of the very narrow right of the Government to prevent." In the absence of such standards, which had not been developed, Blackmun felt the Court should proceed with great caution. He added his concern that allowing publication of the Pentagon Papers might have dire consequences both in Vietnam and in Paris. Should that be the case, "then the Nation's people will know where the responsibility for these sad consequences rests."

It is worth a moment's pause to take stock. The Court was essentially of three minds about the Times-Post case. Several Justices thought the First Amendment permitted neither prior restraint nor subsequent punishment. Several others thought, as the case then stood, both remedies might be proper. The middle group (Justice White, at least, and probably Justice Stewart) would have sustained a criminal conviction but not an injunction. There are important differences between relief before and after the fact that illumine the distinction, without suggesting that the middle course was necessarily the proper one in this case.

First, there is the vital interest of the general public in receiving the information--an interest which may be paramount under the First Amendment. A prior injunction denies the information to the people, who may after all be the best judges of its worth and possible danger. Moreover, a decision to prosecute after publication is exposed to public view, where a decision to seek an injunction against publication may remain totally in the dark, insulated from public scrutiny.

Second, the procedures by which the two cases are tried differ substantially. A criminal defendant is entitled to have his case heard by a jury. (A proceeding for injunctive relief, being in equity, has historically been heard without a jury.) In a criminal case the government must prove its case beyond a reasonable doubt, and not simply by the preponderance of the evidence as in a civil suit. These and other differences in procedure between the two cases may have significant bearing on substantive rights.

Finally, the very visibility of a proceeding after the fact enhances the likelihood that First Amendment freedoms will be protected. Suppose the extreme case: A governor who has effective control over the judiciary is under attack. A newspaper obtains highly damaging information which it plans to print. The district attorney finds out and seeks an injunction. A trial judge grants the injunction and a higher court affirms--all without even revealing the nature of the underlying material, which might be innocuous on any objective scale. (Only the newspaper itself knows the truth, but will risk citation for contempt and perhaps the jailing of its editor if it discloses.) This scenario simply could not occur if prior restraint were foreclosed. Once the news is out, all participants in the drama become accountable.

These considerations suggest that even if the information were highly damaging to vital governmental interests, suppression should be permitted only under the most extraordinary circumstances. Justice Brennan, in the Times-Post case, demonstrated how very narrow the exception should be. Of course even subsequent criminal punishment of editors and publishers is constitutional only when there has been a clear and present danger to a substantial governmental interest (or a violation of some other valid law such as those dealing with obscenity and fraudulent advertising.) But even a clear and present danger should not justify a prior restraint. What the proper test is, we still do not know. The Court said only that the Government had failed in the Pentagon Papers case to meet the "heavy burden" or to overcome the "heavy presumption" against restraint. What additional showing would have shifted the balance must remain a matter of speculation.

II. Prior Restraint, Fair Housing and Unfair Tactics

The issue of prior restraint seldom reaches the Supreme Court. But it came there twice during the 1970 Term. In the Times-Post opinion, reliance was placed upon a case decided earlier the same spring. Although factually different, it reflected a common principle. A suburban Chicago real estate broker was angered by leaflets and handbills claiming that he was engaged in "blockbusting" and other allegedly unfair tactics. He claimed the charges were untrue, and that they invaded his privacy. On this basis the Illinois trial court granted an injunction against the fair housing group responsible for the leaflets, and the appellate court affirmed.

The Supreme Court reversed[2], with only Justice Harlan dissenting on technical grounds. There was no question the activity involved was protected by the First Amendment; it was at all times peaceful, even if offensive to the broker. Since the injunction imposed a prior restraint, the same "high burden" discussed in the Times-Post case had to be met here. Resort to the claim of privacy could not overcome that burden; the broker was seeking not to keep the leaflets out of his own home (which might have presented a quite different question) but rather to keep the information away from the public. Nor did the claim of "coercion" withdraw First Amendment protection from the leaflets; many publications attempt and intend to influence conduct without forfeiting constitutional stature. Thus the case was an easy one, providing a

sort of dress rehearsal for the difficult and complex drama that awaited the Court at the end of the Term.

III. Government Benefits, Conditions and Internal Security

In view of the concern of the legal profession about its own standards, it is not surprising that there has been much litigation concerning admission to the practice of law. This past Term the Court passed upon loyalty-security provisions imposed on applicants for the bar in New York, Arizona and Ohio. All three cases were decided by the narrowest of margins, 5-4, and the distinction between them provides no clear, bright line for future guidance.

The bare majority first struck down Ohio's requirement that an applicant tell the bar examiners whether he has ever been "a member of any organization that advocates the overthrow of the government of the United States by force," and that he "list the names and addresses of all clubs, societies or organizations to which [he was or had been] a member since registering as a law student."[3] Ohio presumably could not deny an applicant admission to the bar for mere membership in a subversive organization--nothing less than "knowing, active membership with a specific intent to further the organization's unlawful aims" would disqualify. Thus the bar examiners lacked power to ask a question the answer to which could not affect the respondent's status. Nor, under earlier decisions, could the applicant be required to list all organizations to which he belonged; the governmental interest in such information was remote and the dangers of injury to the individual substantial. Moreover, the applicant had already freely given much pertinent information, not only to the Ohio examiners but also on the New York bar admission form (upheld by the Court in a companion case, of which more in a moment).

The Court then held unconstitutional a portion of the Arizona bar admission form.[4] In addition to furnishing detailed information about past activities, employment, etc., the Arizona applicant was required to indicate whether he had ever been a member of the Communist Party or any other organization "that advocates overthrow of the United States Government by force or violence." The same previous decisions that were dispositive in the Ohio case were also relevant here. Since the particular applicant had freely answered many questions about former affiliations and occupations, the interest of the bar examiners in obtaining the additional information was highly attenuated. Moreover, the area touched by the inquiry was an unusually sensitive one. The examiners already had all the information to which they were legitimately entitled. The question in issue invaded that freedom of expression and association protected by the First Amendment.

The New York case went the other way by the narrowest of margins.[5] An applicant for admission to the bar was required to furnish proof that he "believes in the form of government of the United States and is loyal to such government." The general provision has been translated into two questions on the application form.

The first asked whether the applicant had ever organized or joined a group which he knew to advocate or teach the violent overthrow of the government. If the answer to that inquiry were affirmative, the applicant then had to indicate whether during the period of affiliation he had the specific intent to further the unlawful aims of the organization. Although the Court had no assurance that New York officials would disregard an affirmative answer to the first part in the absence of a confession of specific intent on the second part, the question passed muster because its two elements were closely related.

Justice Stewart cast the critical ballot, voting to sustain the New York law but strike down the Arizona and Ohio requirements. Thus his opinions bear close scrutiny. First, he felt the Arizona and Ohio inquiries were substantially broader than that of New York, and thus exceeded the constitutional bounds within which New York had remained. Arizona and Ohio implied they would reject an applicant for mere membership in the Communist Party or a similar group--a power which Justice White felt a state could exercise, but which Justice Stewart clearly would not sanction. Moreover, the New York case was brought by a group of law students, none of whom had yet applied for the bar, while the other two suits involved real applicants who had refused to answer the challenged questions and been turned down before coming to court. Justice Stewart has always shown a certain impatience with premature challenges to the constitutionality of laws. That impatience was reflected at several points in his opinion sustaining the New York procedure. While other considerations are no doubt of greater importance, this personal factor may shed some light on Stewart's Solomonic role in a brace of cases that found his colleagues consistently deadlocked, 4-4.

One footnote to the discussion of state regulation of loyalty-security matters: During the Term the Court decided a group of five cases the significance of which may be obscure to non-lawyers. For some time now a person who is threatened with or actually under prosecution for violation of an unconstitutional state law or city ordinance may be able to get a federal court injunction protecting his First Amendment rights. The Court had expanded this remedy in a suit to enjoin harassment of a group of civil rights lawyers in Louisiana through a series of bad faith actions under invalid laws. Now the Court narrowed the remedy quite drastically. The pivotal case involved a challenge to a California criminal syndicalism law virtually identical to an Ohio statute which the Court held unconstitutional two years earlier.[6] Despite the probable invalidity of the law, the Court found lacking here such elements as harassment, bad faith on the part of the prosecution, or the impossibility of obtaining justice in the state criminal courts. Thus, as the Court observed in one of the companion cases, "mere irreparable injury"--the ordinary showing needed to obtain a decree from a court of equity--would not suffice when the effect of an injunction would be to stop the state's law enforcement machinery in its tracks.

IV. Public Places, Order and Decorum

On April 20, 1968, Robert P. Cohen walked into the Los Angeles County Courthouse wearing a jacket on the back of which appeared the words "Fuck the Draft." For this highly novel expression of anti-war sentiment, Cohen was arrested and charged with violation of an old California breach of the peace law. Its provisions forbade "tumultuous or offensive conduct" and use of "vulgar, profane or indecent language in the presence of women or children, in a loud and boisterous manner . . . ." (It was under this same law that the perpetrators of the so-called "Filthy Speech Movement" at Berkeley had been arrested for using the same word during rallies in the spring of 1965.) Cohen was promptly tried, convicted and sentenced.

Few would have supposed that Cohen's jacket would ever reach the rarified atmosphere of the United States Supreme Court (even the California Supreme Court declined to review the case). But at least four Justices--the number required to grant a petition for certiorari--found the constitutional issue meritorious. Presumably the Court saw in the case a welcome bit of comic relief from an otherwise rather somber Term.

Justice Harlan, writing an opinion for a sharply divided Court, obviously enjoyed himself without disparaging the constitutional principle.[7] At the outset, he made it clear no conduct was involved in the case, but only pure speech. It was entirely peaceful at that. Nor had the state made any attempt in its laws to differentiate (as it might have) between language appropriate to the parlor and the locker room, putting the courthouse corridor on the parlor side of the line. Nor did the case fall within an exception the Court has long recognized for "fighting words"--that is, highly inflammatory epithets likely to bring the hearer to blows with the speaker. Nor could the conviction rest upon any notion of "assaulting" a captive audience; persons offended by Cohen's jacket were free to look away and there was no evidence that anyone's sensibilities were directly invaded.

The question that remained after this preliminary analysis was whether California could single out use of a particular word, whatever the context, as the basis for criminal punishment. (The New Jersey legislature tried to do just this several years ago, by listing several hundred taboo words it wished not to be said within the state. The reporter of legislative debates was soon besieged for copies of the bill, which became the hottest item in Trenton.)

Justice Harlan stressed that cases like Cohen's tested most sharply the policies and the limits of free expression. "That the air may at times seem filled with verbal cacaphony," he affirmed, "is in this sense not a sign of weakness but of strength." Moreover, there was no rational basis on which a state could be permitted to proscribe this word but not others; soon the judgment which words were "taboo" would become highly subjective and everyday speech might be severely censored. Finally, restraints on particular words could not be dissociated from possible suppression of ideas conveyed through those words. While Cohen's particular message might seem to be of

minimal importance, his choice of a medium of expression could not be restricted without setting a dangerous precedent.

The Cohen case had a curious companion, decided without an opinion because the Court was equally divided.[8] (It is Supreme Court practice that an equal division, usually 4-4 because one Justice is absent or has taken himself out of the case, affirms the judgment below without opinions on either side.) This case involved a New York art dealer named Radich, who was arrested for desecrating the flag. In his gallery he had displayed various statues and sculptures composed largely of United States flags. The two that apparently drew the ire of the arresting officer were a furled flag representing an erect penis on a human body, and a stuffed, flag-covered dummy suspended in a noose. Such uses of the flag, Radich explained, constituted his form of opposition to the Vietnam War. His arguments were rather similar to Cohen's, although the law involved in the Radich case was narrower and focussed more sharply on the conduct in question than the California breach of the peace law. But because of the equal division, we shall never know why the Court deemed the two cases distinguishable.

About the same time the Court considered a related issue in another seemingly minor case. The question was the constitutionality of a Cincinnati ordinance which made it a crime for "three of more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by . . . ." Writing for the majority, Justice Stewart (himself a former Vice-Mayor of Cincinnati) found the ordinance clearly invalid: it "is unconstitutionally vague because it subjects the exercise of the right of assembly to an unascertainable standard, and unconstitutionally broad because it authorizes the punisnment of constitutionally protected conduct."[9] There was a special risk in this open-ended law: "Such a prohibition . . . contains an obvious invitation to discriminatory enforcement against those whose association together is 'annoying' because their ideas, their lifestyle or their physical appearance is resented by the majority of their fellow citizens." The reference to lifestyle and physical appearance is both important and novel. It suggests that the Supreme Court may at some time in the future bring such matters within the purview of the First Amendment, along with more traditional forms of expression.

The dissenters in the Cincinnati case (of whom there were four) disputed the majority's analysis of the "vagueness" test. In their view the ordinance was not vague on its face; persons subject to it could at least understand the words, even if enforcement might reflect subjective and varying considerations. Only if it were shown that the ordinance had in the particular case been used to punish constitutionally protected conduct or expression would the dissenters strike it down.

V. Regulation of Professional Conduct: Group Legal Services

In the past decade the Supreme Court has several times considered the constitutionality of state rules about furnishing legal services to members of organizations. The first such case involved the National Association for the Advancement of Colored People, which Virginia had enjoined from providing counsel to groups of black parents in school segregation suits. That decision was followed by two cases involving labor union programs for furnishing attorneys to handle certain kinds of personal injury cases for individual members. In each case, the Supreme Court concluded that the group members and the attorneys were simply exercising First Amendment rights in gaining access to the courts.

The most recent recurrence of this issue came from Michigan. The bar and courts of that state had distinguished the earlier decisions and had banned certain group legal services arrangements for members of the United Transportation Union. The program was designed mainly to enable union members to file suits under the Federal Employer's Liability Act. Four provisions of the Michigan decree were held by the Supreme Court to violate the First Amendment:[10] (1) a ban against the union "giving or furnishing legal advice to its members or their families"; (2) a provision forbidding the Union from furnishing to any attorney the names of injured members or information about their injuries; (3) a ban against members of the union accepting or receiving compensation of any sort for the solicitation of legal employment for any lawyer; and (4) a ban against control by the union of fees charged by any lawyer under the arrangement. In the context of the case, and given the nature and purpose of the program, the Court found that each of these restrictions abridged First Amendment rights. Mr. Justice Black concluded for the Court: "The common thread running through our decisions [involving group legal services] is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment. However, that right would be a hollow promise if the courts could deny associations of workers or others the means of enabling their members to meet the costs of legal representation."

VI. Access to the Polls: Regulation of Elections and Political Parties

Several years ago the Supreme Court greatly expanded the rights of minor and splinter political parties to get their candidates on the ballot. The Justices struck down a cumbersome procedure by which Ohio required a new party to obtain signatures of voters equal to 15 % of votes cast in the most recent election and to meet other burdensome conditions. Last Term the Court considered somewhat similar but less onerous conditions imposed by Georgia on minor parties. Distinguishing the Ohio procedure, the Court sustained the Georgia restrictions as consistent with voters' and candidates' First Amendment rights.[11]

Where Ohio had compelled a new party of obtain signatures of 15 % of voters in the last election, the Georgia law demanded only 5 %. A longer time was provided for circulating the petition in Georgia. Electors who signed a nominating petition were not restricted in any way, and there was no limitation on write-in votes on ballots. Nor did Georgia require a new party to set up its own elaborate primary machinery for the nomination of candidates, as did Ohio. The Court concluded that while Ohio had made it virtually impossible for a new, special-interest, or one-shot party ever to get on the ballot in time for an election, Georgia had merely imposed certain good-faith qualifications without precluding effective participation by such groups. Although Georgia's 5 % threshhold was admittedly higher than that of many other states, the procedure was nonetheless justified: "There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization and its candidates on the ballot--the interest, if no other, in avoiding confusion, deception and even frustration of the democratic process at the general election."

VII. Obscenity: New Developments in Procedure and Substance

In the realm of obscenity, a most intriguing constitutional question opened by a 1969 decision of the Court has now been settled. Two years ago the Court held, in Stanley v. Georgia, 394 U.S. 557 (1969), that the private possession and use of obscene material in the confines of one's home could not be made a crime. The decision reflected a convergence of First Amendment and Fourth Amendment freedoms. It raised a question that has much troubled the lower courts: If one person has a constitutional right to possess and use obscene materials, how is he to obtain it unless someone else enjoys a constitutional right to distribute that material?

The issue reached the Supreme Court in two cases during the 1970 Term. One involved the sending of obscenity through the mails; the others its importation into the United States by a citizen returning from a trip abroad. In both cases the Court gave the expected answer: The right to possess and use pornography in private does not imply a constitutional right to sell or distribute (or import for the purpose of sale) the same material.[12] The obscenity laws still apply, in other words, with full vigor to the point at which the material changes hands, whatever may be its constitutional status thereafter: "The personal constitutional rights of those like Stanley to possess and read obscenity in their homes and their freedom of mind and thought do not depend on whether the materials are obscene or whether obscenity is constitutionally protected. The rights to have and view that material in private are independently saved by the Constitution."

Three members of the Court dissented on this issue. For Justices Black and Douglas, Stanley had conclusively settled the present question the other way: "If a citizen has a right to possess 'obscene' material in the privacy of his home he should have the right to receive it voluntarily through the mail. Certainly when a man

legally purchases such material abroad he should be able to bring it with him through customs to read later in his home. . . . The right to read and view any literature and pictures at home is hollow indeed if it does not include a right to carry that material privately in one's luggage when entering the country." But the rest of the Court, though divided on the precise approach, agreed that the right of privacy did not reach so far.

The most recent brace of obscenity decisions also settled several lingering procedural questions. The Court has insisted that procedural safeguards surrounding the seizure or retention of obscene materials must be prompt and efficient, so as to protect First Amendment interests. In the censorship or motion pictures for example, the Court has required that there be a very prompt determination by a court on the issue of obscenity; that the censor must bear the burden of proof, and that any stay pending appeal of the decision must be brief. To ensure compliance with these conditions, the Court has struck down statutes or ordinances that did not guarantee a prompt judicial hearing. Early in 1971, the Court held unconstitutional certain provisions of the federal postal laws because an administrative order restricting use of the mails could become effective without speedy court review, because the person challenging the order was required to assume the burden of proof, and because distribution might be enjoined for a substantial period pending appeal.[13]

Later in the Term, however, the Court sustained provisions of the customs laws as applied to seizure of allegedly obscene materials imported by a returning citizen. Although the laws in question did not explicitly meet the Court's procedural requirements, the majority found such assurance implicit in the statutory scheme and in its application to the particular case. The laws thus reflected the same policy considerations, even if not the precise language, that the Supreme Court had imposed on the states and cities. Since the law was an act of Congress, the Court was free to make such assumptions--a function which would normally be left to state courts in review of state and local laws.[14]

VIII. Defamation and the Constitution: More of Libel and Slander

In 1964 the Supreme Court decided the New York Times libel case, holding that the press had a constitutional privilege to print certain false statements about public officials. The majority announced that a public official could recover damages under state libel laws only by proving that the statements were made with actual malice--that is, with actual knowledge they were false or with reckless disregard of the matter of truthfulness. Since the New York Times decision, nearly every Term of Court has brought a new refinement of the privilege. During the past year the Court decided four cases involving state defamation laws and made the most substantial extension of the privilege since 1964.

Three cases were decided early in the Term. The first involved a syndicated column referring to a candidate for office in New Hampshire as a "former small-time bootlegger." Claiming he had never been a bootlegger, whether small-time or large, the man brought suit for damages against the local newspaper that carried the column. The New Hampshire courts held the New York Times privilege inapplicable and granted him damages. But the Supreme Court reversed, establishing two important precepts:[15] first, that a seeker of public office was fair game for press comment to the same extent as a holder of public office; second, the Court held that a charge of criminal conduct (such as being a "small-time bootlegger") was never irrelevant to the fitness for office of an official or candidate, and was therefore covered by the Times privilege. (The Times decision had confined the rule to "official conduct" of an office-holder, suggesting that his private life might not be fair game for the press.)

The second case was quite similar to the first. It involved newspaper charges that a man in Florida who held one office and was a candidate for another had once been cited for perjury in a federal court. When the man sued the paper for damages, claiming the accusation was both false and harmful to his reputation, the Florida courts allowed recovery. But the Supreme Court reversed again, holding as in the New Hampshire case that even a remote charge of criminal activity was within the privilege of fair comment.[16] Because such accusations bore on a person's fitness for public office, the press should be given broad latitude in reporting them. Even if false, such charges would support damages in a libel suit only if proved to have been made with knowledge of their falsity or with reckless disregard of whether or not they were false. The proof in neither the New Hampshire nor Florida case reached the level of such "actual malice."

The third of these cases was more complex. A Chicago police officer named Pape was sued ten years ago for allegedly depriving a black family of their civil rights during a raid upon their apartment. The case went all the way to the Supreme Court, and the plaintiffs eventually recovered substantial damages from Pape. Some years later the United States Civil Rights Commission reported the incident as part of a survey of complaints involving claimed police brutality. Time magazine later picked up the story, but rewrote it in a way that that omitted the "alleged" from the reference. Thus it sounded to Time's readers as though the Civil Rights Commission, and not the plaintiff in the lawsuit, were accusing Pape of the acts involved. Pape then sued Time, seeking substantial recovery for what he claimed was a harmful and irresponsible libel. The lower federal courts supported his claim and granted damages.

Once again the Supreme Court reversed.[17] Unquestionably the Time story presented the incident in a misleading way. Moreover, the reporter and researcher involved were aware that the Civil Rights Commission had merely summarized the complaint. But the Justices held that the proof still fell short of the requisite "actual malice." The key element was the ambiguity of the Civil Rights Commission report itself--the rather casual way in which charges, allegations and proved violations were interlaced in the discussion of police misconduct. Under the circumstances, the reporter and researcher had reason to believe the Commission thought the charges

against Pape were true, so the omission of "alleged" fell short of deliberate falsification. The Court concluded, however, with a caveat on the scope of the judgment; "Nothing in this opinion is to be understood as making the word 'alleged' a superfluity in published reports of information damaging to reputation."

The major development in the defamation area was still to come. The case arose when one George Rosenbloom was the subject of several news broadcasts on a Philadelphia radio station. These broadcasts identified Rosenbloom as a distributor of obscene books and magazines following a police raid on his home. (The first report was without qualification; later broadcasts added "alleged" or "reportedly" to statements about Rosenbloom's activities.) When Rosenbloom and other victims of the raid filed a suit in the federal court to enjoin the police and district attorney, the same station picked up the theme again, identifying the parties as "girlie-book peddlers." Rosenbloom telephoned the studios of the station in question to protest. The person he talked with at the studio apparently hung up after a few minutes of discussion. Rosenbloom never requested a retraction, nor was one offered by the station.

Rosenbloom brought suit in the federal court seeking substantial damages. Clearly he was not a public official. Nor was he even the "public figure" to whom the Court had earlier applied a modified version of the New York Times standard. Until the moment of the raid and the broadcast, in fact, Rosenbloom was more or less like any other private citizen of Philadelphia. But the incident in which he became involved was a matter of public interest.

By a narrow margin, the Court held that the privilege should be extended to include fair comment on such events.[18] The underlying policies fostering freedom of the press and mandating broad latitude, especially in the reporting of hot news, were comparable. Thus, "drawing a distinction between 'public' and 'private' figures makes no sense in terms of the First Amendment guarantees." Nor were those interests relevant to whether the plaintiff voluntarily thrust himself into the public eye, as public officials and public figures to a degree had done.

Reaffirming the policies behind the New York Times privilege, the Court now concluded that the protection reflecting those policies had been too narrowly defined. Thus Rosenbloom's case became the vehicle for a new standard, one looking to the nature of the event as well as to the status of the plaintiff. (The old test was not completely superseded, of course. There might be situations, such as the New Hampshire and Florida cases considered earlier, where false statements about past conduct of public officials could still claim the privilege even though no matter of general or public interest was involved.)

The Court was curiously divided in reaching this result. Justice Brennan wrote the plurality opinion, speaking for himself and the Chief Justice and Justice Blackmun. Justice Black concurred; from the first entry into this area he had indicated--along with Justice Douglas, who removed himself from the Rosenbloom case--

that he would go substantially further and permit no libel suits against the media. Justice White concurred in the judgment of the Court, preferring a narrow ground. For him it was sufficient that public officials were involved on the other side; under those circumstances the right of fair comment should extend to the entire event, "with no requirement that the reputation or the privacy of an individual involved or affected by the official action be spared from public view."

There were three dissenters. Justice Harlan, who had taken a narrower view in the cases involving public figures, thought the focus now should be upon the measure of damages. In such cases, he would henceforth limit a plaintiff, regardless of proof of actual malice, to recovery of only those damages (which might include some punitive damages) that bore a "reasonable and purposeful relation to the actual harm done." In that way some of the distinctions drawn by the plurality would be unnecessary, as would its justification for extending the New York Times privilege into new areas. Justices Marshall and Stewart thought the Harlan limitation too mild, just as they felt the plurality view too drastic. For them "the appropriate resolution of the clash of societal values here is to restrict damages to actual losses"--that is, to eliminate all punitive damages in all libel suits. If such a rule were extended across the board, it would then be unnecessary to rely on the kinds of distinctions essential to the views of some of their colleagues.

The Rosenbloom decision is extremely important even though no single view commanded a majority of the Court. Had Justice Douglas participated (as he ordinarily would), he and Justice Black would have joined the Brennan-Burger-Blackmun wing to make a Court for the "public interest" test. This is clear because Black and Douglas have from the beginning indicated their desire to do away with all libel actions. Thus they would always provide two additional votes for whichever block of the Court came nearest to that position. The Rosenbloom decision thus implicitly changes the rule for public figures. Writing for a plurality in 1967, Justice Harlan established a privilege for comment on public figures that fell substantially short of the New York Times privilege. Now that the full privilege applied to matters of public interest, the status of public figures would appear to have been settled beyond doubt. Finally, the division within the Court may be more abstract than real. The great majority of libel suits probably involve either public officials (including candidates for public office) or matters of public interest. While no constitutional privilege shields purely private libels, of which there are no doubt a great many in everyday life, the number of significant lawsuits remaining outside the privilege is likely to be quite small.

IX. Conclusion: The First Amendment and the Burger Court

The 1969 Term, the first under Chief Justice Burger, was inconclusive in the free expression area. Not until Justice Blackmun joined the Court could the difficult issues be resolved. The views of the new Court thus begin to emerge from the record of the 1970 Term. It is a curious pattern, not easy to fathom. Take, for example, the two most important decisions involving the liberty of the press--the Pentagon Papers

case and the Rosenbloom case. In both cases the media won resounding victories, among the most important victories of the last decade. But the lineup of the Court was almost completely reversed. Justices Black and Brennan supported the press in both cases, while Justice Harlan took an opposite view in both. Justice White thought they were both close cases. But the Chief Justice and Justice Blackmun, among the most vigorous supporters of a press privilege in the Rosenbloom case, were the most forceful dissenters in the Pentagon Papers case. Conversely Justices Stewart and Marshall, who joined the majority with conviction in the New York Times-Washington Post case, took a rather restrictive view of the privilege in the libel area. Perfect consistency is not expected, even in closely related areas of the law. But the divergence between these two decisions, coming only three weeks apart, is curious.

The rest of the Term presents a somewhat mixed picture. The Court sustained the right to distribute anti-blockbusting leaflets in Illinois, the right to channel legal business through a labor union in Michigan, the right to wear a jacket saying "fuck the draft" in California, and the right to assemble freely on the streets of Cincinnati. The cases involving admission to the bar were split down the middle, depending on the precise terms of the application form. The obscenity cases, too, reflected no clear pattern; procedural safeguards seem to have gained a bit while substantive rights suffered slightly. There has never been any clear, bright line in the obscenity area, and it was not expected that the Burger Court would bring clarity where the Warren Court had been unable to do so.

On balance, then, the Term seems to have been a generally satisfactory one for the First Amendment. The Pentagon Papers and Rosenbloom cases hold the key. Two such significant precedents in a single Term should suffice. Next year things will probably be somewhat quieter. In this area, at least, the Court deserves a rest.

FOOTNOTES

[1]New York Times Co. v. United States, 403 U.S. 713 (1971).

[2]Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971).

[3]In re Stolar, 401 U.S. 23 (1971).

[4]Baird v. State Bar of Arizona, 401 U.S. 1 (1971).

[5]Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154 (1971).

[6]Younger v. Harris, 401 U.S. 37 (1971).

[7]Cohen v. California, 403 U.S. 15 (1971).

[8]People v. Radich, 401 U.S. 531 (1971).

[9]Coates v. Cincinnati, 402 U.S. 611 (1971).

[10]United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971).

[11]Jenness v. Fortson, 403 U.S. 431 (1971).

[12]United States v. Reidel, 402 U.S. 351 (1971).

[13]Blount v. Rizzi, 400 U.S. 410 (1971).

[14]U. S. v. 37 Photographs, 402 U.S. 363 (1971).

[15]Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971).

[16]Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971).

[17]Time, Inc. v. Pape, 401 U.S. 279 (1971).

[18]Rosenbloom v. Metromedia, Inc. 403 U.S. 29 (1971).

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ARTICLES, BOOKS, AND COURT DECISIONS

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Hayse v. Van Hoomissen, 321 F.Supp. 642 (1970). Oregon magazine dealers challenge Oregon obscenity laws.

Hanover v. Northrup, 325 F.Supp. 170 (1970). Grade school teacher refuses to take part in daily recital of flag salute.

Healy v. James, 311 F.Supp. 1275 (1970). SDS, freedom of association and Central Connecticut State College.

Hentoff v. Ichord, 318 F.Supp. 1175 (1970). Publication of House Committee on Internal Security report entitled "Limited Survey of Honoraria Given Guest Speakers for Engagements at Colleges and Universities."

Hernandez v. School Dist. No. One, Denver Colo., 315 F.Supp. 289 (1970). Suspension of high school students of Mexican descent for wearing black berets as symbols of protest and unity.

Hodsdon v. Buckson, 310 F.Supp. 528 (1970). Hodsdon (plaintiff) displays simultaneously on the front of his residence in Wilmington, Del. the UN flag in the position of honor on the right side of his house and the U.S. flag in the subordinate position on the left side of his house and flown at half-mast position to express displeasure with U.S. involvement in Vietnam and various civil injustices--all in violation of Delaware flag desecration statute.

Houston Peace Coalition v. Houston City Council, 310 F.Supp. 457 (1970). War protest parade and the Houston, Texas parade permit ordinance.

Jones v. Board of Regents of University of Arizona, 436 F.2d 618 (1970). Distributing handbills on the university campus.

Karp v. Collins, 310 F.Supp. 627 (1970). Profane, indecent, and offensive language in New Jersey.

Kiiskila v. Nichols, 433 F.2d 745 (1970). Civilian employee at military installation expelled from installation for her anti-war activity.

King v. Jones, 319 F.Supp. 653 (1970). Demonstrations, protest, and the First Amendment.

Korn v. Elkins, 317 F.Supp. 138 (1970). University of Maryland officials refuse to allow students to publish an issue of a student publication picturing on its cover a burning American flag.

La Rue v. State of California, 326 F.Supp. 348 (1971). Topless dancing, obscenity and the First Amendment.

Lisker v. Kelley, 315 F.Supp. 777 (1970). Political candidates and the requirement that they sign a Pennsylvania loyalty oath.

Long Island Vietnam Moratorium Committee v. Cahn, 437 F.2d 344 (1970). Emblem of American flag with peace symbol superimposed.

Lovelace v. Leechburg Area School District, 310 F. Supp. 579 (1970). High school student's mustache.

Mailloux v. Kidey, 435 F.2d 565 (1971). Teacher writes taboo word on blackboard.

Mangold v. Albert Gallatin Area School District, 438 F.2d 1194 (1970). Bible reading and school prayer.

Masson v. Slaton, 320 F.Supp. 669 (1970). Terroristic threats and freedom of speech.

Molpus v. Fortune, 311 F.Supp. 240 (1970). University of Mississippi prohibits the appearance of an outside speaker.

Montgomery v. White, 320 F.Supp. 303 (1970). Teachers and the First Amendment.

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Orr v. Thorpe, 427 F.2d 1129 (1970). Teachers' right to free association.

Owens v. Commonwealth, 179 S.E.2d 477 (1971). Freedom of assembly in Virginia.

Palmigiano v. Travisono, 317 F.Supp. 776 (1970). Censorship in prisons.

Parducci v. Rutland, 316 F.Supp. 352 (1970). The dismissal of a Montgomery, Alabama 11th grade teacher for assigning Kurt Vonnegut's Welcome to the Monkey House.

Parker v. Morgan, 322 F.Supp. 585 (1971). Desecration of the flag.

People v. Arvio, 321 N.Y. S.2d 382 (1971). Demonstration at selective service boards.

People v. Buckley, 320 N.Y.S.2d 91 (1971). Censorship and obscenity.

People v. Luros, 480 P.2d 633 (1971). Distributing obscene literature in California.

People v. P.A.J. Theater Corp., 321 N.Y.S.2d 26 (1971). Film and obscenity.

People v. Pearl, 321 N.Y.S.2d (1971). Demonstrations and obstruction of pedestrian traffic.

Pickings v. Bruce, 430 F.2d 595 (1970). Freedom of speech and association at Southern State College, Magnolia, Arkansas.

Reichenberg v. Nelsen, 310 F.Supp. 249 (1970). Length of hair of college student.

Riseman v. School Committee of City of Quincy, 439 F.2d 148 (1971). Distribution of literature on junior high school premises.

Roth v. Board of Regents of State Colleges, 310 F.Supp. 972 (1970). Freedom of speech and the dismissal of an assistant professor at Wisconsin State University, Oshkosh.

Severson v. Duff, 322 F.Supp. 4 (1970). Profane, loud or boisterous language outraging the sense of public decency.

Shinall v. Worrell, 319 F.Supp. 485 (1970). Obscenity in North Carolina.

Sill v. Pennsylvania State University, 318 F.Supp. 608 (1970). Regulation of university students' conduct, "speech," and "non-speech" at Penn State University.

Socialist Labor Party v. Rhodes, 318 F.Supp. 1262 (1970). Ohio loyalty oath and free political association.

State v. Cleveland, 469 P.2d 251 (1970). Lewd and indecent language at Kansas State University.

State v. Dornblasen, 267 N.E. 2d 708 (1971). Films and obscenity in Ohio.

State v. Leigh, 179 S.E. 2d 708 (1971). Speech and conduct in North Carolina.

State v. Oyen, 480 P.2d 766 (1971). Distributing leaflets at high school in Washington.

Sword v. Fox, 317 F.Supp. 1855 (1970). Regulations on demonstrations and peaceful assembly at Madison College, Harrisonburg, Va.

Trujillo v. Love, 322 F.Supp. 1266 (1971). Southern Colorado State College's Arrow (college newspaper), a controversial editorial, and the First Amendment.

United States v. Articles of "Obscene" Merchandise, 215 F.Supp. 191 (1970). Obscenity--public and private.

United States v. Gower, 316 F.Supp. 1390 (1970). Photographs, films and obscenity in Washington, D. C.

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United States v. Patillo, 431 F.2d 293 (1970). Threats against the President of the United States.

United States v. Pipefitters Local Union No. 562, 434 F.2d 1116 (1970). Freedom of association and the First Amendment.